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Supreme Court, U.S.
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In The

Supreme Court of the United States

NEGUSSU DEMISSIE and KIRUBEL NEGUSSU,

Petitioners,

v.

JOHN ASHCROFT,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where petitioner assisted ethnic minority Amharic citizens of the northern Gondar region of Ethiopia resist with arms the ethnically motivated, army-backed, land expropriation by majority Tigreans, was such assistance a "serious non-political crime"?

2. Did the court below violate due process in mischaracterizing ethnically motivated land expropriation as the legitimate exercise of authority by majority ethnic Tigreans against minority Amharic citizens of Ethiopia?

3. Did the courts below violate due process by finding that the Kefange Patriotic Front was attempting to overthrow the government when in fact petitioner credibly testified that it had no such purpose, and the 1999 State Department report states that certain other groups, not mentioning the KPF, were trying to overthrow the government?

4. Did the court below violate due process by misapplying the *Aguirre-Aguirre* proportionality test of "serious non-political crime" by mischaracterizing the government of Ethiopia as "legitimate" where the 1999 State Department report relied upon shows widespread human rights abuses of ethnic minorities, including harassment of minorities seeking to participate in elections?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Negussu Demissie and Kirubel Negussu respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is an unreported decision issued March 9, 2004, Docket No. 03-1574 (App., *infra*, 1). Petitioner filed a request for rehearing on April 22, 2004. The Court of Appeals denied petitioner's request for rehearing on May 11, 2004 also in an unreported decision (App., *infra*, 21).

JURISDICTION

The Court of Appeals denied petitioner's request for rehearing on May 11, 2004. This petition for a writ of certiorari is filed within the 90 day jurisdictional period as provided by Supreme Court Rule 13. Supreme Court jurisdiction arises under Title 28 U.S.C. § 1254 in petitions for writ of certiorari from the orders of U.S. Courts of Appeals.

STATUTORY PROVISIONS INVOLVED

The Refugee Definition

"The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the

case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . " 94 Stat. 102, 8 U.S.C. § 1101(a)(42).

The Exclusion Clause

8 U.S.C. § 1158(b) Conditions for granting asylum.

(1) In general. The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)].

(2) Exceptions.

(A) . . .

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

8 U.S.C. § 1158.

STATEMENT OF THE CASE

Mr. Demissie's Uncontroverted Claim

Mr. Demissie is a 53 year old native and citizen of Ethiopia. Appellant Kirubel Negussu is his son, and his claim is dependent on the claim of his father. Mr. Demissie and his son belong to the Amharic ethnic group, and are from Gondar, an Amharic region of northern Ethiopia.

Mr. Demissie had been trained at a military academy, and was a supply officer prior to 1991, the year in which the Ethiopian Peoples Revolutionary Democratic Front (EPRDF) came to power. He was immediately arrested and imprisoned and interrogated for three months by the new regime.

The EPRDF then asked Mr. Demissie to train officers on military maintenance and supply in exchange for pay and a pension. He accepted, but was immediately pressured to join the Amhara wing of the EPRDF, which he refused out of personal conviction, infuriating the officers. His employment and the pension were terminated.

He then was approached by the Kefange Ethiopia Patriotic Front (KPF), which he joined in December 1991. The KPF was opposed to the "ethnic dictatorship" of the EPRDF, in particular the policy of land seizures in fertile areas of Gondar, whereby land would be taken from ethnic Amharas and given to ethnic Tigrayans.

The KPF initially used peaceful means of protest, sending a delegation to the capital Addis Ababa to seek redress. While they were returning to their home region, the delegates were slaughtered by EPRDF forces. Shortly afterward, the KPF forces shot down an EPRDF helicopter which had come to attack them. Armed clashes

continued at times when the EPRDF came to forcefully remove farmers from their land.

After joining in 1991, Mr. Demissie recruited members for the KPF but never engaged in fighting himself.

In 1995, there were for the first time national elections, which were substantially controlled by the EPRDF, and in which few of the many opposition parties participated.

Mr. Demissie was again approached by the EPRDF and asked to train army personnel in logistics, and they again demanded that he become an EPRDF member. He refused to join, and was questioned as to whether he supported an opposition group like KPF. Shortly afterward, on February 4, 1995, the Internal Security Department of the EPRDF imprisoned petitioner on account of his political activities with the KPF. He was tortured and interrogated to obtain information about persons he had recruited into the KPF. He was kept in solitary confinement for one month, slapped, kicked, and beaten until he could no longer stand, bound by nylon rope and beaten over his entire body, and threatened with death with a gun pointed to his ear.

After seven months of extra-judicial imprisonment, he was released on bond and told he had committed a "serious political crime" and would be prosecuted. He was never accused of any particular crime.

In September 1996, Mr. Demissie was transporting new recruits to Gondar; after he exited the bus, an EPRDF militia appeared. Mr. Demissie escaped but the recruits were interrogated and shot.

After this, Mr. Demissie stayed in hiding for approximately ten months, meeting his wife in secret locations. Officials came to his house late at night and early in the morning to asking about him, even following his children to question them. Other members were tortured and revealed Mr. Demissie's name.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S DECISION IN *AGUIRRE-AGUIRRE*

The Asylum Criterion

The Convention Relating to the Status of Refugees was adopted by the international community in the aftermath of holocaust and related human rights atrocities in the Second World War.[1]

The United States did not initially adopt the Convention and Protocol, but instead provided some relief to persons fearing political persecution, but on a limited basis, and primarily to victims of communist regimes.[2]

The Refugee Act of 1980, 94 Stat. 102, was intended by Congress to bring the practice of the United States into line with the 1967 United Nations Protocol Relating to the

[1] *See* Wildes, The Dilemma of the Refugee: His Standard for Relief, 4 Cardozo L. Rev. 353, 355-56 (1983).

[2] Cox, Theodore, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status, 10 Brooklyn J. Int'l Law 333 (1984) (note 276), *cited in INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), n. 24.

Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

The key criterion is the definition of refugee. The 1980 Act provides: "The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . " 94 Stat. 102, 8 U.S.C. § 1101(a)(42).

This court has had prior occasion to reject an Attorney General's overly restrictive interpretation of the refugee criterion. In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987), the extremely rigorous "more likely than not" standard, in prior use in connection with adjudicating withholding of deportation claims under Immigration and Nationality Act ("INA") § 243(h), was held inconsistent with the plain meaning of the "well-founded fear of persecution" criterion of the Refugee Protocol and Convention. Indeed a "10% chance of being shot, tortured, or otherwise persecuted" is enough for a subjective fear to be well-founded, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440.

Origin of the Concept of "Political" Crime

John Stuart Mill, in the House of Commons on August 3, 1866 suggested the following definition of "political" crime in the context of extradition: "Any offence committed

in the course of or furthering of civil war, insurrection, or political commotion."[3] Sir J. F. Stephen, in *History of the Criminal Law of England*, Vol. 2, p. 71 added the proviso "if those crimes were incidental to and formed part of the political disturbances," a formulation which was adopted in *In re Castioni,* 1 Q.B. 149, 155-156 (1890). The "incidence" test of political crime was adopted by courts in this country. *In re Castioni* is the source of the "incidence" test adopted in American jurisprudence. In *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894) a United States court refused to extradite "Salvadoran citizens who allegedly committed murder and robbery in an unsuccessful attempt to put down a revolution." *Koskotas v. Roche*, 931 F.2d 169, 172 (1st Cir. 1991). *Castioni* is noted in *McMullen v. Immigration & Naturalization Service*, 788 F.2d 591, 596 (9th Cir. 1986); that court declined to accept such a broad standard in the context of "political offenses under section 243(h)(2)(C)," *id.*, deferring instead to the Convention and Protocol Relating to the Status of Refugees.

The Exclusion Clause 1F In International Law

The drafters of the 1951 Convention sought to exclude applicants from refugee status who had committed grave crimes in World War II or other serious non-political crimes, or who were guilty of acts contrary to the

[3] *Cited in* In the Matter of the Prosecution of Charlton and Five Others on the Representation of Nottingham Crown Court, 1993 JLR 360.

principles of the United Nations, linking the ideas of humanity, equity and the concept of refuge.[4]

Article 1F(b) provides that "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: . . . (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; . . . " In its recently published "Global Consultations," the UNHCR explains: "[T]he hearing officer should assume the applicant innocent until 'proven guilty', the benefit of the doubt must be accorded to the applicant given the very serious consequences, and there should be no automatic presumptions, each case being viewed on its own facts."[5]

However, Article 1F "must be used sparingly and only where extreme caution has been exercised."[6]. The exclusion clause under Article 1F covers crimes of an extreme nature, including crimes against humanity, war crimes and acts contrary to the purposes and principles of the United Nations, along with "serious non-political crimes"; indeed the drafters were concerned lest the perpetrators of the Holocaust could avoid prosecution by seeking refugee status, *Handbook*, para. 147.

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[4] *See* Standing Committee of the Executive Committee of the High Commissioner's Programme, "Note on the Exclusion Clauses," 47th Session, UN doc. EC/47/SC/CRP.29, 30 May 1997, para. 3.

[5] *Refugee Protection in International Law: UNHCR's Globel Consultations on International Protection*, Feller, E., Türk, V. and Nicholson, F. eds., Cambridge Univ. Press 2003, p. 439.

[6] *Id.* at 429.

Terrorist organizations vs. organizations struggling for national liberation

Terrorist organizations, defines as "groups [which] exhibit a willingness to engage in the indiscriminate killing of people to achieve political ends"[7] raise difficult issues for interpretation of the exclusion clause. Other definitions of terrorist acts include "criminal acts intended or calculated to provoke a state of terror in the general public," General Assembly Resolution 53/108, 26 Jan. 1999. In a formulation of the Federal Court of Canada: "[a]ny other act intended to cause death or serious bodily injury to a civil, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or international organization to do or abstain from doing any act."[8] It can be considered a mitigating factor where an applicant was engaged in a UN-recognized struggle for national liberation, and at a minimum did not violate Article 3 of the Geneva Convention,[9] *see* UNHCR,

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[7] Prepared statement of Judge Sofaer, Legal Adviser, US State Department, at the Senate Hearing on the Anglo-US Supplementary Extradition Treaty, S.HRG 99-703 re TR.DOC.99-8, 1 Aug. 1885, at p. 263.

[8] *Manickavasagam Suresh v. Minister of Citizenship and Immigration and the Attorney General of Canada, Federal Court of Canada*, [2000] 2 FC 592 (CA), A0415-99, 18 Jan. 2000.

[9] Article 3 of the Geneva Convention:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms

(Continued on following page)

"Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practice Violence," 1 April 1988, paras 21 and 22.

"Serious reasons for considering" that an application is subject to the exclusion clause for a "serious non-political crime" requires proof approaching the level of proof necessary for a criminal conviction,[10] and the burden is on the state to make an adequate showing to invoke the exclusion.[11]

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and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.N.T.S. 3316, 75 U.N.T.S. 35.

[10] *See* M. Bliss, "Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1 F Exclusion Clause', 12 *International Journal of Refugee Law*, 2000 (Supp.) p. 92, 99-100 and 115-117.

[11] M. Timmer, M. Soffers and J. Handmaker, "Perspectives on the Legal Basis and Practice of the Netherlands Government Regarding Exclusion of Refugees in Terms of s. 1F of the 1951 United Nations Convention in International Protection," 2001, § 4.

The *Handbook* a "serious" crime "must be a capital crime or a very grave punishable act" *id.*, para. 155. Crimes relevant here relate to a "criminal character," para. 156, and it is relevant if the "criminal character still predominates" para. 157.

Canadian Decisions

Gonzalez v. Canada [1994] 3 F.C. 646, May 26, 1994, http://reports.fja.gc.ca/fc/src/shtml/1994/pub/v3/1994fca0300.shtml is instructive. In this case, the applicant, a Nicaraguan conscripted into military service, was engaged with his battalion in a fire-fight with contras who were in a house amidst civilians, some of whom were killed in the fire-fight. The Refugee Division held he was excluded from the refugee definition under Article 1F since there was "serious reason to believe that he had committed a crime against humanity". The appeals court reversed: "The applicant's participation in this military action did not fall within the concepts of war crime nor crime against humanity. It was war, not war crime. Since there was neither a war crime nor crime against humanity, the tribunal erred in applying the exclusion clause." *Gil v. Canada* [1995] 1 F.C. 508, http://reports.fja.gc.ca/fc/src/shtml/1994/pub/v1/1995fca0215.shtml is instructive. Article 1F exclusion applied to an Iranian anti-Khomeini activist who was involved in bombing crowded bazaars and arson attacks against regime supporters; *held* that the barbarous, disproportionate violence against civilians rather than armed adversaries excluded crimes from being considered 'political' in nature, even if motivation had political aspect.

Aguirre-Aguirre

This court, in *INS v. Aguirre-Aguirre,* 526 U.S. 415 (1999) addressed the "serious non-political crime" exclusion directly. At the outset *Aguirre-Aguirre*, accepts the "atrocious acts" test of *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). Atrocious acts – including "indiscriminate bombing, murder, torture and the maiming of innocent civilians" – are *per se* not political and will bar asylum relief. Acts which are less than atrocious will not bar refugee status if "the political aspect of the offense [does not outweigh] its common-law character," and there is no "gross disproportion between means and ends . . . ." The Board is not required to first make a finding as to "atrociousness." Rather, the Board may simply make a general finding as to a "lack of proportion with [an applicant's] objections, or a "lack of proportion between means and ends" to find a crime "nonpolitical."

"[D]anger to the community" was considered a decisive factor in *Matter of Rodriguez-Coto*, 1985 BIA LEXIS 1, 19 Dec. 208 (BIA 1985) cited favorably in *Aguirre-Aguirre*, *see also Matter of Carballe,* 1986 BIA LEXIS 4, 19 I.&.N. Dec. 357 (BIA 1986) (alien convicted of armed robbery and related offenses, received 15 year sentence; court will consider nature of crime(s) to determine danger to the community).

To properly evaluate proportion and ends and means under *Aguirre-Aguirre*, at the very least, the record as to the legitimacy of Government actions, and the legitimacy of measures taken to counter abuse must be accurately portrayed. There is a difference between "writing an exegisis on each point raised," which the Fourth Circuit deems unnecessary, and plainly misstating the facts.

The Decision of the Immigration Judge

The IJ's basic holding was that "[a] duly-constituted and functioning government of a country has a legitimate right to protect itself against persons who seek its overthrow." And Mr. Demissie's group, KPF, "has been characterized as a local militia, armed opposition group, and bandits." The court held that the "three and seven month imprisonments were severe, they were not persecution because the imprisonments were for violations of laws having general applicability." Turning the meaning of "serious non-political crimes" on its head, Mr. Demissie's political affiliations, instead of bringing his acts within the protected ambit of "political crimes," became a part of his *mens rea* in opposing the government by unlawful means!

The Decision of the Board of Immigration Appeals

The Board compounded the error of the IJ by "researching" and taking administrative notice of the 1999 State Department Report, which is cited for the propositions that (i) there were relatively fair elections in Ethiopia in 1995 which makes it "a lawfully constituted government," (ii) organizations were barred from political participation due to failure to renounce violence (listing groups not including the KPF) and (iii) by implication there exist peaceful means to effect political change in Ethiopia, not accepted by the KPF or Mr. Demissie. Therefore Mr. Demissie's activities amount to "participation in [at least an attempted] coup" on account of which he may be legitimately prosecuted. "A sovereign nation has the legitimate right to protect itself against persons who seek its overthrow" *citing Matter of R-*, 20 I&N Dec. 621 (BIA 1992) and *Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990).

The 1999 Report and Clear Mischaracterization by the Board and the Fourth Circuit

The 1999 State Department report, with respect to which the BIA took administrative notice, played a prominent part in the decision of the BIA. Because of its importance, much of it has been reproduced in the appendix.

Despite the BIA's reliance on it, a picture of a fairly elected, functioning democracy – with respect to which only "peaceful means" of effecting change are legitimate – cannot be gleaned from the 1999 Report.[12] The main conclusion, rather, is that "the Government's human rights record generally was poor." App. 31.

The EPRDF, dominated by one faction, the Tigray Peoples' Liberation Front, won the 1995 elections in the aftermath of a "long and brutal civil war"; most opposition groups boycotted the elections due to government interference, and those who did participate complained of harassment. Extra-judicial killings, arbitrary arrest and detention, and prolonged pretrial detention are common place.

The report states that student demonstrations against the arrests of two teachers (for criticizing textbooks) led to

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[12] State Department reports can be unreliable, *see Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004) ("State Department's reports are sometimes skewed toward the governing administration's foreign-policy goals and concerns. *See, e.g.*, David Sloss, Hard-Nosed Idealism and U.S. Human Rights Policy, 46 St. Louis U. L.J. 431, 432 (2002) (observing that, prior to 1998, "the country reports frequently contained half-truths about human rights abuses in friendly countries" so as to "avoid damaging our relationships with those countries"); *see also Gramatikov*, 128 F.3d at 620 ("There is perennial concern that the Department softpedals human rights violations by countries that the United States wants to have good relations with.")).

widespread demonstrations and riots during which police killed 10, injured hundreds, and detained up to a thousand.

The right to engage in peaceful political activity is restricted in practice; registration procedures are cumbersome, often registration is withheld, and even meeting with international donors can lead to reprimand.

The judiciary lacks "trained staff and funds" and was weak and overburdened, although it "continued to show signs of independence". The Criminal Procedure Code requires that any detained person be charged and informed of the charges within 48 hours, but in practice, persons are held without a warrant and are not charged.

Prison conditions are poor with serious overcrowding, inadequate food, unsanitary conditions, lack of access to medical care; several prisoners and detainees died due to "illness and disease."

While The Report mentions some opposition groups attempting to overthrow the Ethiopian Government, KPF is not among them.

The Decision of the Fourth Circuit

Mr. Demissie appealed the decision of the BIA, arguing that (i) the record does not support the assertion that KPF seeks to overthrow the EPRDF government by force, (ii) that, fairly viewed, the record supports Mr. Demissie's assertion that the punishment of Mr. Demissie – including torture and extra-judicial detention – was *per se* perspective. He asserts that the BIA violated due process by failing to consider the evidence in the record that the government of Ethiopia does not protect human rights,

and therefore that a fear of repatriation is indeed well-founded.

The Circuit Court succinctly stated that "the Board need not write an exegesis on every point. What is required is merely that it consider the issues raised and announced its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Casalena v. INS*, 984 F.2d 105, 107 (4th Cir. 1993).

Certain "Democratic" Regimes Act Tyrannically to Minorities

The BIA's conclusion that once a fair election is held, their further inquiry is not needed to ascertain that the regime's legitimacy is flawed. An obvious example of a democractic regime which went on to act tyrannically to minorities is Milosevic's Yugoslavia.[13] There is no question that the ethnic cleansing by democratically elected majority Serbs against minority ethnic Albanians was not amenable to "legitimate" resistence at the ballot box or by resort to other peaceful means. Forceful land expropriation is all to common in Africa, as the present crisis in Dafur, Sudan exemplifies.[14]

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[13] Hitler can also be said to have been democratically elected, Kershaw, Ian, *Hitler: 1889-1936: Hubris,* Norton, W. W. & Company, Inc., 2000. *See generally* Sell, Louis, *Slobodan Milosevic and the Destruction of Yugoslavia,* Duke University Press, June 2003.

[14] *See, e.g.* Wolf, Daniel, "Death and Deception in Darfur," Wash. Post, July 31, 2004; Page A23.

The legitimate "land policy" cited by the Board is pure fiction

The claim by the Board that the ethnic majority Tigrayans imposed a lawful "land policy" in the Gondar region is tememerious at best. Nothing in the record supports this interpretation, and can only be explained by a reasoning that once an election is held, all subsequent acts are *ipso facto* legitimate. Mr. Demissie, found credible, recounted that his organization, the KPF, never had any intention of overthrowing the government, and employed force only as a last resort to defend against land expropriation by maurading Tigrayan troops.

There is no evidence that Mr. Demissie committed any crime whatsoever

For the "serious non-political crime" exemption to apply, there must be proof of a crime having been committed. What is the crime at issue? Is the fact that Mr. Demissie is being sought by the government *ipso facto* proof that he must deserve what the certain extra-judicial punishment which awaits him? On this record, one can only make an educated guess that the crime is opposing the government as a member of a group which seeks the overthrow of the government.

There is no evidence in the record that he is sought for *prosecution*; rather, he would be extra-judically killed, like the recruits on the bus, or that he would be extra-judicially detained and tortured – again. The 1999 Report is clear that those deemed to oppose the government as a rule suffer lengthy extra-judicial detention under horrible circumstances or are killed, like the student demonstrators.

There is no evidence that any imputed "crimes" are "non-political"

None of Mr. Demissie's activities could be remotely compared to *McMullen*-type atrocities – terroristic bombings resulting in civilian casualties, nor even to harm to innocent members of the public in *Aguirre-Aguirre*, tying up uncooperative bus passengers before destroying public buses. Indeed no activities of the KPF were directed against any civilian target whatsoever.

We have seen that the "land policy" formulation is a flat-out invention of the Board with not an iota of support in the record. Moreover, the "anti-government group" incantation is also devoid of factual support. Mr. Demissie plainly declared that his group was not anti-government, only against the ethnically-based land expropriation; that his group was only active in its home Gondar region.

Is Ethiopia a legitimate democracy with recourse to peaceful means of seeking change, including elections, free speech, freedom to organize and protections for minority rights? Or is it a "tyranny of the majority" – which Tocqueville even feared for the United States[15] – where minorities are systematically denied full participation in elections, where free organization, free speech and basic property rights are met with extra-judical killings, extra-judicial detention, shooting of demonstrators and

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[15] de Tocqueville, *Democracy in America*, Heffner, Richard (Editor) Signet Classics Chapter XV: "I do not say that there is a frequent use of tyranny in America at the present day; but I maintain that there is no sure barrier against it, and that the causes which mitigate the government there are to be found in the circumstances and the manners of the country more than in its laws."

flagrantly violating existing legal and constitutional protections.

The record is clear. Fair play and respect for ethnic minorities is not the reality and nothing in the record suggests otherwise.

If mischaracterization by the courts below is corrected, then Mr. Demissie's support for armed resistance, as a last resort, to extra-judicial land expropriation is clearly proportionate to the legitimate end of preventing such expropriation. If the ransacking of stores was considered a "serious crime" by the court in *Aguirre-Aguirre*, then the wholesale taking of land by the Government is an even more serious crime.

In the words of Mr. Demissie:

> "I left Ethiopia on July 1997 for fear of persecution by the EPRDF regime. As I have explained here under the ethnic based dictatorship that is in power have detained, interrogated and tortured me for being an Amhara, a member of the opposition and an ex-army officer." App. 22.

Properly interpreted, Mr. Demissie's activities on behalf of the KPF, even to the extent the KPF resorts to violence against military targets, if there exists any true "crime," such crime is "political" and not within the exclusion for "serious, non-political crimes." To return Mr. Demissie to extra-judical torture, detention and/or death cannot be countenanced by the courts of this country.

The Rule of Lenity

It is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of

the alien. *See INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). 480 U.S. 421, 449," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). To the extent there is any ambiguity in the interpretation of the refugee criterion and exclusion clause – I submit there is not – then the clause should be interpreted in a way to protect asylum seekers from harm based upon their political opinion.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: August 9, 2004
New York, New York

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1574

NEGUSSU DEMISSIE; KIRUBEL NEGUSSU,

Petitioners,

versus

JOHN ASHCROFT, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals (A76-419-153; A76-419-154)

Submitted: January 30, 2004 Decided: March 9, 2004

Before NIEMEYER, MICHAEL, and GREGORY, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Thomas Hutchins, IMMIGRANT AND REFUGEE APPELLATE CENTER, LLC, Alexandria, Virginia, for Petitioners. Peter D. Keisler, Assistant Attorney General, David V. Bernal, Assistant Director, Colette J. Winston,

OFFICE OF IMMIGRATION LITIGATION, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Petitioners Negussu Demissie ("Demissie") and Kirubel Negussu ("Negussu"), natives and citizens of Ethiopia, petition for review of an order of the Board of Immigration Appeals ("Board") dismissing their appeal from the immigration judge's order denying their applications for asylum and withholding of removal. Demissie is the primary applicant for asylum; the claims of his son, Negussu, are derivative of his application. *See* 8 U.S.C. § 1158(b)(3) (2000); 8 C.F.R. § 1208.21(a) (2003).

Rather than challenging the merits of the Board's decision on appeal, the Petitioners contend that the Board erroneously failed to address one of their issues, testimony, and much documentation of record, in violation of their due process rights. We have reviewed this challenge and find it to be without merit. As we have previously stated, the "Board need not . . . 'write an exegesis on every contention. What is required is merely that it consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" *Casalena v. INS*, 984 F.2d 105, 107 (4th Cir. 1993) (citing *Becerra-Jiminez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987)). We find the Board's opinion to be more than adequate to satisfy due process.

We therefore deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A76 419 153 – Baltimore
A76 419 154

Date: Apr. 21, 2003

In re: NEGUSSU *DEMISSIE*
KIRUBEL *NEGUSSU*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Howard A. Silverman, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] nonimmigrant – remained without permission (both respondents)

APPLICATION: Asylum, withholding of removal

ORDER:

PER CURIAM. The respondents'[1] timely appeal of an Immigration Judge's January 11, 1999, decision denying their applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3), as

[1] The respondents are father and son, natives and citizens of Ethiopia and ethnic Amharas. The younger respondent is a derivative beneficiary of the father's claim for relief.

well as pretermitting [sic] their request for voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c, is dismissed.

On appeal, the respondent argues that the Immigration Judge erred by not finding that his fear that he will be arrested and prosecuted by the Ethiopian government due to his participation and support of the *Kefagne Patriotic Front* ("KPF") (which translates as the "dissatisfied" front) in the Gondar region of Ethiopia constitutes a well-founded fear of persecution under the Act. We find this argument to be without merit. As correctly noted by the Immigration Judge in his decision, a sovereign nation has the legitimate right to protect itself against persons who seek its overthrow. *See Matter of R-*, 20 I&N Dec. 621 (BIA 1992). In furtherance of that objective, such a government has the legitimate right to investigate and detain individuals suspected of aiding and or being a member of the organization that seeks its overthrow. *See Id.* The record reflects the KPF consists of disgruntled former soldiers in the Gondar region of Ethiopia who have refused to relinquish armed struggle in support of their aims and carry on sporadic ambushes on Ethiopian government forces, including the shooting down of a government helicopter (Tr. at 70-83). See Exh. 2, 3, 4, 5, 6. The respondent indicated in his declaration that accompanied his asylum application (form I-589), that he was arrested in 1995 because he was engaged in recruiting former army officers to the KPF. Moreover, the respondent testified that he "personally actively supported the armed struggle the [KPF] advocates (Tr. at 51)." In September 1996, the respondent narrowly escaped being arrested again as he was taking ten new KPF recruits to Gondar to join the Kefagne as either fighters or in another capacity (Tr. at 62).

As indicated by the Immigration Judge in his decision, the respondent, while not directly involved in the fighting, has helped to train and recruit others to join the KPF (I.J. at 6). Consequently, the Ethiopian government's supposed interest in the prosecution of the respondent for his participation in the attempt to overthrow a lawfully constituted government does not constitute persecution within the meaning of the Act. *See Matter of R-, supra.*

We note, however, where a coup is the only means through which a change in the political regime can be effected, punishment for participation in the coup may constitute persecution. *Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990). Notwithstanding, we take administrative notice of the Department of State's *1999 Country Reports on Human Rights Practices*, released on February 25, 2000, which state that the Government of the Federal Democratic Republic of Ethiopia (GFDRE), led by Prime Minister Meles Zenawi, was elected in 1995 to replace a transitional government. The elections were reportedly free and fair, although some irregularities were noted. *See Matter of S-M-J*, 21 I&N Dec. 722, 728 n.2 (BIA 1997) (noting that Board can take administrative notice of recent or changed country conditions). The report also notes that several organizations are barred from political participation because they "have not renounced violence and do not accept the Government as a legitimate authority." *Id.* Accordingly, as there are other peaceful means to effect political change in Ethiopia, which the KPF has rejected, we fail to find the respondent has a well-founded fear of persecution on account of one of the protected grounds under the Act. *Matter of Izatula, supra.*

As the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has

also failed to satisfy the standard of eligibility for withholding of removal, *i.e.*, that it is more likely than not that he will be persecuted on account of a protected ground. 8 C.F.R. § 208.16(b)(2); *INS v. Cardoza-Fonseca*, *supra*; *INS v. Stevic*, *supra*. Further, as the respondents had not been physically present in the United States for a period of one year prior to the issuance of the Notice to Appear (form I-862), the respondents were unable to establish their eligibility for voluntary departure under section 240B of the Act. *See* 8 C.F.R. § 240.26(c)(l)(i).

The respondents raise no arguments on appeal which were not addressed by the Immigration Judge or which would cause us to reverse the Immigration Judge's decision. For these reasons, we affirm the Immigration Judge's decision based upon and for the reasons set forth therein. Accordingly, the appeal is dismissed.

/s/ Edward R. Grant
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
DEMISSIE, Negussu **NEGUSSU, Kirubel**	**Case # 76-419-153** **76-419-154**
(CO-RESPONDENTS)	

CHARGES: **Section 237(a)(1)(B) of the Immigration and Nationality Act (INA),** remaining in the United States for a longer time than permitted.

APPLICATIONS: **INA §208**, asylum; and

INA §241(b)(3), withholding of removal.

ON BEHALF OF RESPONDENT
Aragaw Mehari, Esq.
1511 K Street, NW,
Suite 1131
Washington, D.C. 20005

ON BEHALF OF INS
Mona M. Ragheb, Esq.
Asst. District Counsel, INS
100 S. Charles Street
Baltimore, Maryland 21201

MEMORANDUM OF DECISION AND ORDER

Respondents are native and citizens of Ethiopia. Respondent Negussu Demissie entered the U.S. at Boston, Massachusetts on or about July 27, 1997 as a nonimmigrant with authorization to remain in the U.S. for a temporary period not to exceed January 26, 1998. He was accompanied by his son, Co-Respondent Kirubel Negussu. Both Respondents remained in the U.S. beyond January 26, 1998 without authorization from the Immigration and Naturalization Service (INS).

On February 23, 1998, principal Respondent Negussu Demissie completed an Application for Asylum and Withholding of Deportation (Form I-589). Respondent's son is included as a dependent in the application. Respondents were served with a Notice to Appear (NTA) on March 9, 1998.

Respondent, by and through counsel, appeared before the Court and conceded the allegations of fact and removability as charged. Respondents request asylum under **INA §208** or, in the alternative, withholding of removal under **§241(b)(3)**. For the reasons discussed below, the Court denies Respondents' application for asylum and withholding of removal.

I. Testimonial Evidence

Respondent Negussu Demissie is a forty-eight year old citizen and native of Ethiopia who was born in the Gondar region to the Amharic tribe. He graduated from the military academy and served as a logistic and supply officer in the Ethiopian armed forces under the Mengistu regime. In May 1988, when a group of army officers, including Respondent's immediate commanding officer, attempted a coup that failed, Mengistu retaliated against many officers, including Respondent. Respondent was detained, interrogated and beaten. After six months, Respondent was released. **Respondent's Declaration**.

In May 1991, the EPRDF (Ethiopian People Revolutionary Democratic Front) replaced Mengistu. Unlike Mengistu who was ethnically Amharic, the EPRDF government was dominated by ethnic Tigreans. When the new government came to power, they ordered all army officers to report to designated army bases. Respondent did so and was

detained and interrogated for three months. He was released and assured pension payment in exchange for his agreement to train the EPRDF officers in military supply and maintenance. In September 1991, Respondent started training the officers at the Ministry of Defense. **Respondent's Declaration**.

During this time, EPRDF's political party members were pressuring Respondent to join the Amharic wing of the EPRDF. However, Respondent refused. As a result, Respondent was fired and the pension payments were discontinued. Respondent tried to obtain other employment but found that the available positions were being filled by Tigreans. **Respondent's Declaration**.

Frustrated, Respondent, in December 1991, joined Kefagne (Kefagne Ethiopia Patriotic Front), an outlawed group fighting the EPRDF government. Kefagne is a group operating in the Gondar region to oppose EPRDF's policy of taking land from the farmers and giving it to Tigreans. When the government comes to the Gondar region to enforce the land policy, Kefagne attacks government individuals using guerrilla tactics and other means (including shooting down a government helicopter, in one incident described by Respondent) to prevent the government from carrying out its policy. Secretly working for Kefagne, Respondent helped train its fighters and recruit members. **Respondent's Testimony before the Court**.

In January 1995, the EPRDF government once again interviewed and asked Respondent to train its army recruits in logistics and general supply. It was made clear to Respondent that he was expected to join the EPRDF party before joining the army. When Respondent refused the position because he did not want to join the EPRDF

party, the interviewer started to question Respondent on his involvement in opposition parties. Respondent told him that he was not involved in any other party. **Respondent's Declaration**.

On February 4, 1995, the EPRDF Internal Security Department came to Respondent's house and arrested him. When Respondent asked why he was arrested, he was told that it was because he was active in recruiting ex-army officers for Kefagne. His arrest was to make him confess to this. **Respondent's Testimony before the Court**. Respondent was detained for more than seven months, during which time he claims he was repeatedly tortured and interrogated about his involvement with Kefagne. He was eventually released and told that the prosecutor's office would continue the investigation. **Respondent's Declaration**.

While Respondent's case was with the prosecutor's office, Respondent continued his activities for Kefagne. In September 1996, Respondent was assigned to take ten new Kefagne recruits to Gondar to join Kefagne either as fighters or in other capacities. **Respondent's Testimony before the Court**. At Gondar, just after Respondent and another Kefagne member had stepped off the bus, government officials arrested the recruits still on the bus. Respondent managed to disappear into the crowd and went on to meet the Kefagne comrade in Gondar. **Respondent's Declaration**. Respondent then returned to Addis Ababa but instead of returning to his own home, Respondent hid at a friend's home during which time, the government would ask his wife and children about his whereabouts. **Respondent's Testimony before the Court**.

While Respondent was in hiding, he tried to find a way to leave the country. Respondent managed to secure a valid passport and exit visa. When he learned that a Kefagne member under torture had given the government his name, Respondent decided to leave Ethiopia as soon as possible. On July 26, 1997, Respondent and his son flew out of the airport and left Ethiopia. **Respondent's Declaration**. Respondent believes that if he is returned to Ethiopia, he will be killed. However, Respondent's wife and children continue to live in their home in Ethiopia. Likewise, five of Respondent's siblings remain in Ethiopia. **Respondent's Testimony before the Court**.

II. Documentary Evidence

The Court admitted and considered the following documentary evidence:

1. Notice to Appear, served on Respondent March 9, 1998 (**Court Exhibit 1**);

2. Summary of news items in Ethiopia from Indigo Website (**Court Exhibit 2**);

3. Indian Ocean Newsletter of January 4, 1997 from Indigo Website (**Court Exhibit 3**);

4. Listing of various organizations in Ethiopia from Indigo Website (**Court Exhibit 4**);

5. Respondent's Application for Asylum and for Withholding of Deportation, Form I-589 (**Respondent's Group Exhibit 1**);

6. Declaration of Negussu Demissie (**Respondent's Group Exhibit 1**);

7. Copy of Letter from And Alem Mulaw of the Kefagn [sic] Ethiopia Patriotic Front (**Respondent's Group Exhibit 1**);

8. Copy of Birth Certificate of Kirubel Negussu (**Respondent's Group Exhibit 1**);

9. Copy of Certificate from Ethiopian Management Institute given to Maj. Negussu Demissie in November 1987 (**Respondent's Group Exhibit 1**);

10. Copy of Certificate from the Bureau for Electronic Computer Services given to Negussu Demissie in November 1992 (**Respondent's Group Exhibit 1**);

11. Copy of Certificate from the Army Ordnance General Supply Depot given to 2nd Lt. Negussu Demissie in July 1973 (**Respondent's Group Exhibit 1**);

12. Copy of Diploma from the Haile Selassie 1st Military Academy given to Negussu Demissie in October 1972 (**Respondent's Group Exhibit 1**);

13. Copy of Degree of Bachelor of Arts from the Addis Ababa University given to Negussu Demissie Ahmed in July 1987 (**Respondent's Group Exhibit 1**);

14. Copy of Diploma from the United States Army Logistics Management Center to 1lt. Negussu Demissie in June 1976 (**Respondent's Group Exhibit 1**);

15. Copy of Certificate of Attendance from Iveco Service Training in 1984 (**Respondent's Group Exhibit 1**);

16. Copy of Diploma from the United States Army Quartermaster School to 1lt. Negussu Demissie in April 1976 (**Respondent's Group Exhibit 1**);

17. Copy of Ethiopian Passport of Negussu Demissie Ahemed with exit Visa and U.S. Visa (**Respondent's Group Exhibit 1**);

18. Copy of Ethiopian Passport of Kerubel Negussu Demissie with exit Visa and U.S. Visa (**Respondent's Group Exhibit 1**);

19. Washington Post article "Ethiopia: A Rights Violator?" dated April 13, 1998 (**Respondent's Exhibit A**);

20. The Economist article "Federal Sham" dated August 16, 1997 (**Respondent's Exhibit B**);

21. Memo by Amnesty International to Education International dated May 12, 1997 (**Respondent's Exhibit C**);

22. Human Rights Watch 1997 Report on Ethiopia (**Respondent's Exhibit D**);

23. Amnesty International Report 1997 on Ethiopia (**Respondent's Exhibit E**);

24. Human Rights Watch report "Human Rights Curtailed in Ethiopia" dated December 9, 1997 (**Respondent's Exhibit F**);

25. Pages from report by the American Association of International Commission of Jurists dated April 18, 1995 (**Respondent's Exhibit G**);

26. Translated letter from Respondent's wife, translated February 1998 (**Respondent's Exhibit H**);

27. UNHCR, REFWORLD, Response to Information Request, Ethiopia: Kefagne dated May 6, 1994 (**Government's Exhibit 1**);

28. Indian Ocean Newsletter article "Tension Mounts in Several Regions" dated November 28, 1992 (**Government's Exhibit 2**);

29. Indian Ocean Newsletter article "Unrest in Gondar" dated April 17, 1993 (**Government's Exhibit 3**);

30. Indian Ocean Newsletter article "Violence in Gondar Province" dated September 18, 1993 (**Government's Exhibit 4**);

31. British Broadcasting Corporation article "Chief of Staff Denies Rumours of Continued Fighting" dated December 21, 1993 (**Government's Exhibit 5**); and

32. Telegram from the Department of State regarding the Kefagne Patriotic Front, dated July 28, 1998 (**Government's Exhibit 6**).

At the conclusion of the proceedings, including the presentation of testimony and evidence, the Court reserved its decision to further review the evidentiary record.

POSITION OF THE PARTIES

I. Respondents

Respondent claims that he is eligible for a grant of asylum under **INA §208** due to past persecution suffered at the hands of the present government of Ethiopia on account of his political opinion. He further claims that he has a well-founded fear of future persecution if forced to return to Ethiopia. Additionally, Respondent states that he is eligible for withholding of removal under **INA §241(b)(3)**. Respondent claims his son, Co-Respondent, is eligible for derivative asylum and withholding of removal.

II. INS

The INS finds Respondents to be subject to removal pursuant to **INA §237(a)(1)(B)** in that after admission as an nonimmigrant under **INA §101(a)(15)**, they remained in the U.S. for a time longer than permitted. The INS argues that Respondent is being prosecuted, and not

persecuted, for his activities and therefore should not be granted asylum or withholding of deportation.

FINDINGS

I. Asylum

A. Respondent's Testimony was Credible

The Court need not make any credibility findings. See ***Matter of Vigil*, 19 I&N 572 (BIA 1988)**. However, as the Court is given the primary responsibility for judging the credibility of the witnesses, the Court feels compelled to address this issue. See ***Matter of Rafipour*, 16 I&N 470 (BIA 1978); *Matter of T-*, 7 I&N 417 (BIA 1957)**.

Respondent's testimony generally was believable and consistent with evidence presented. Respondent presented a " . . . believable, consistent and sufficiently detailed claim so as to provide a plausible and coherent account of the basis for his alleged fear." ***Matter of Y-B*, Int. Dec. 3337 (BIA 1998) (citing *Matter of Mogharrabi*, 19 I&N 439 (BIA 1997)**. Nor does the Court find specific and cogent reasons to conclude that Respondent provided incredible testimony. ***A-S*, Ins. Dec. 3336 (BIA 1998)**. However, a finding of credible testimony by an asylum applicant is not dispositive as to whether asylum should be granted. See ***Matter of E-P-*, Int. Dec. 3311 (BIA 1997)**. The Court must consider Respondent's statutory eligibility for asylum in light of the evidence of record.

B. Prosecution and not Persecution on Account of

In an application for asylum, the alien bears the burden of proving that he meets the statutory criteria and that he merits the favorable exercise of discretion. ***Matter of***

***Acosta*, 19 I&N 211, 214-215 (BIA 1985)**. In order to be statutorily eligible for asylum, Respondent first must establish that he meets the definition of "refugee" under **INA §101(a)(42)**:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, . . .

In Respondent's case, he does not appear to have been persecuted or have a well-founded fear of persecution.

A duly-constituted and functioning government of a country has a legitimate right to protect itself against persons who seek its overthrow. Such a government has a legitimate right to investigate and detain individuals suspected of aiding or being a member of an organization that seeks to overthrow it. See ***Matter of R-*, 20 I&N 621 (BIA 1992)**. Punishment by the government for violations of laws applicable to the population as a whole, is prosecution, not persecution. See ***Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977)**. Prosecution and imprisonment, even if severe, for violation of . . . a law having general applicability is not persecution, unless the punishment is imposed for invidious reasons. See ***id.***; ***Matter of Acosta*, supra; *Matter of Mogharrabi*, supra**.

In the case at hand, the government of Ethiopia is trying to defend itself from Kefagne, a group which has been

characterized as a local militia, armed opposition group, and bandits. See **UNHCR, REFWORLD response**. The government has a land policy that Kefagne is protesting with violence and guerrilla tactics, including attacking government individuals and shooting down a government helicopter. **Respondent's Testimony before the Court**. Respondent, while not directly involved in the fighting, helped train and recruit people to join the Kefagne fighters. **Respondent's Testimony before the Court**. Because of his contribution to the violence, Respondent is being punished with imprisonment for violations of laws applicable to the population as a whole. See ***Coriolan v. INS*, supra**. Even if the three and seven months imprisonments were severe, they were not persecution because the imprisonments were for violations of laws having general applicability. See ***Matter of Acosta*, supra; *Matter of Mogharrabi*, supra**. For example, when Respondent was detained the second time, he was told that it was because he was recruiting men for Kefagne. See **Respondent's Testimony before the Court**. This shows that Respondent was detained because he was helping a violent group that is fighting the government. Therefore, Respondent was prosecuted and not persecuted.

Furthermore, Respondent was not subject to punishment on account of his political opinion. In ***Matter of R-***, the Board denied asylum and withholding of deportation to an Indian Sikh subjected to police brutality because the police believed that he had information concerning a militant group. There, the Board wrote

> There is no evidence that the police were concerned with anything other than the fact the applicant was thought to be involved with those engaged in a violent struggle against the government. There is

> nothing to indicate that, such being the case, the police cared what the applicant's individual political opinions may or may not have been or whether he was or was not a Sikh.

***Matter of R-*, supra at fn. 3**. Similarly, Respondent was detained because the government thought he was involved with Kefagne, a group engaged in a violent struggle with the government. There is no indication that the government cared about Respondent's individual political opinion[1] nor that Respondent was ethnically Amharic when the government offered Respondent the position with the military and pressured him to join the Amharic wing of the EPRDF. See **Respondent's Declaration**. Since Respondent Negussu Demissie was not persecuted on account of any of the five enumerated grounds, and since Respondent Kirubel Negussu is claiming asylum as a derivative, asylum is denied to both Respondents.[2]

II. Withholding of Removal

To establish eligibility for withholding of removal, an alien must demonstrate a clear probability of persecution in the country designated for deportation on account of one of the enumerated grounds. ***INS v. Stevic*, 467 U.S. 407 (1984)**. This means that the alien must establish that it is more likely than not that he would be subject to persecution for one of the grounds specified in the **INA**. ***Id***. Since Respondent has

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[1] According to the record, the only political opinion that Respondent had that differed with the government's stance concerned the ownership of land in the Gondar region.

[2] The INS did not raise the issue of whether Respondent himself ordered, incited, assisted, or otherwise participated in the persecution of another.

failed to demonstrate a well-founded fear of persecution on account of one of the enumerated grounds, he cannot meet the higher standard of proof of clear probability of persecution. ***INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207 (1987)**. Therefore, his request for withholding of removal is denied.

CONCLUSION

The Court denies Respondents' application for asylum and withholding of removal since Respondent Negussu Demissie has not proven that he has a well-founded fear of persecution on account of one of the five enumerated grounds and Co-Respondent Kirubel Negussu is applying as a derivative. Respondents are not entitled to voluntary departure under **INA §240B(b)(1)(A)** in that they have not been physically present in the U.S. for a period of at least one year immediately preceding the date the notice to appear was served.

An appropriate order is attached.

January 11, 1999
Date

/s/ John F. Gossart, Jr.
John F. Gossart, Jr.
United States
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 11, 2004

No. 03-1574
A76-419-153
A76-419-154

NEGUSSU DEMISSIE; KIRUBEL NEGUSSU

Petitioners

v.

JOHN ASHCROFT, Attorney General

Respondent

On Petition for Rehearing and Rehearing En Banc

The Petitioners' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Niemeyer, Judge Michael, and Judge Gregory.

For the Court

/s/ Patricia S. Connor
CLERK

Dec. 20, 1997.

US Immigration & Naturalization Services.

DECLARATION OF NEGUSSU DEMISSIE [sic]

I, Negussu Demissie, declare the following in support of my application for political asylum in the United States of America.

I am an Ethiopian citizen and I was born in Gondar northern Ethiopia. After completing my elementary and high school education in Gondar, I joined Harrer Military Academy where I graduated as 1st. Lieutenant in 1972 (1965 EC). Throughout my carrier in the military, I served as logistics management and supply officer. I begun as supply officer at the Ordinance Corps in Addis Ababa and when I left the army in 1991, I was a Lt. Col. and an Assistant Maintenance and Supply Depot head in the Ethiopian Ground Forces. While in the military I have received advanced trainings in supply management both in Ethiopia and the USA. I have also obtained Bachelor of Arts Degree (BA) in Political Science and International Relations from Addis Ababa University.

I left Ethiopia on July 1997 for fear of persecution by the EPRDF regime. As I have explained here under the ethnic based dictatorship that is in power have detained, interrogated and tortured me for being an Amhara, a member of the opposition and an ex-army officer.

Political Persecution During the Derg

Many officers in the Ethiopian armed forces were against the extremities of the Mengistu regime. They were tired of the civil war that had been going on for almost two

decades and with no end in sight. They were also convinced that military success in the war front and a lasting solution to the civil war could not be achieved under Mengistu's leadership. Thus, in May 1988 a group of army officers that included my immediate commanding officer Bir.General Tesfaye Terfe staged a coup. Unfortunately, the coup was not well planned and well executed. It failed and Mengistu retaliated by executing hundreds of officers he suspected of involvement. I was among the several officers arrested. On June 4, 1988, I was taken from my office to an army base near the old airport where I was detained for six months. I was interrogated and tortured repeatedly. I was beaten with a leather strip and dipped in filthy water. I denied any association with the coup which was the truth. From what I learned later, the immediate cause for my arrest was my friendship with Gen. Tesfaye one of the ring leaders of the coup. Gen.Tesfaye and I graduated from the same Military Academy and we were good friends. Eventually, I was released from detention because no evidence was produced against me. Tesfaye and those officers who were found to be active participants of the coup were executed. Although I was allowed to go back to work, my promotion was delayed for two years on unsubstantiated charges that I was a sympathizer of the coup.

Persecution Under the EPRDF

In May 1991 Mengistu was replaced by the EPRDF (Ethiopian People Revolutionary Democratic Front), a party dominated by the Tigreans. The very first agenda of the EPRDF when it came to power was to dismantle the Ethiopian army. All army officers were ordered to report to designated army bases with their weapons. I reported at

the Toli army training center where I was detained and interrogated for three months (June 3, 1991 up to Sept 10, 1991). At the end of the third month, I was brought to the EPRDF Military authorities at Toli who requested that I give training to the EPRDF officers on military supply and maintenance. In exchange for my services, they promised to have me released from detention and also assured me pension payment. I accepted the offer and on Sept.10, 1991 I began giving training to EPRDF officers at the Ministry of Defense in Addis Ababa.

While I was giving the training, I was approached by the EPRDF political officers and was persistently pressured to join the Amhara wing of the EPRDF. I declined the offers. At the same time, I was secretly approached by the Kefagne Ethiopia Patriotic Front (KEPF, see the document attached) members. The KEPF is a popular democratic movement opposing the EPRDF's ethnic dictatorship. I sympathized with Kefagne because I was convinced that genuine Ethiopians should battle the ethnic-based policy of the EPRDF that was leading Ethiopia into total disintegration.

As I have noted above, I had courteously told the EPRDF political cadres that I could not join the party because of my personal convictions. The EPRDF officials were infuriated and [sic] few weeks later, I was told that I was relieved of my training position and that my pension payment was discontinued. This did not surprise me. There after [sic] I began looking for a job but it was scarce and every vacancy available was filled by Tigreans.

I was frustrated and from that time onwards I resolved to actively fight the EPRDF dictatorship. On December 4, 1991, I registered with Kefagne Ethiopia Patriotic Front.

Kefagne was one of the outlawed organizations in Ethiopia which operated clandestinely. Unlike the EPRDF, Kefagne strongly believed in peaceful resolution of Ethiopian problems. President Meles Zenawi when asked about the possibilities of including the opposition parties (Kefagne, EPRP etc) in the political process and therefore in the Transitional Government, he defiantly said, "EPRDF came to power through the barrel of the gun. We have sacrificed our lives. The opposition should try the same. There is no easy way to power." Inspite of this, Kefagne still and always believes that the Ethiopian problem could only be resolved peacefully and the armed struggle it is currently conducting is a means to this end. It is a means to bring the EPRDF to the negotiating table. I personally do not support violence, but if people were left with no choice, I am of the opinion that they are entitled to rise up in arms. As a member of KEPF, I had served the organization with full dedication (see the attached supporting document). I was a member of the KEPF's subcommittee for logistics in the Addis Ababa region and was also involved in recruiting new members. In view of the rising armed opposition inside Ethiopia and the confrontation with the Sudan, EPRDF urgently needed to organize a professional army. To this end, EPRDF called upon many ex-army officers to help organize and train the new army. I was once again called to train the new recruits in logistics and general supply. Honestly speaking I was not interested in the job but I could not reject it outright because that would make the EPRDF suspecious. The EPRDF officer who interviewed me made it clear that those selected to train were expected to join the EPRDF before getting involved in the army. I declined the offer if party membership is a must. The EPRDF officer in charge of the training program was displeased and reminded me that this was the second time

that I had declined the offer to join the EPRDF. Furthermore, he interrogated me if I am a member of the opposition parties (Kefagne, EPRP, AAPO etc.). I told him that I am not and he vowed to investigate my background keenly. I was frightened and I was seriously thinking of joining the Kefagne forces.

About a month after this incidence, that is on Feb. 4, 1995, I was placed under arrest by the EPRDF Internal Security Department. Three security officers arrived at my residence early in the morning before sun rise [sic] and told me that they had come with an order from their superiors to arrest me. I put up no resistance and I followed them to a car waiting outside. I was detained at an army base in Addis Ababa that had been converted into a security prison. I remained under detention for more than seven months (from Feb. 4, 1995 to Sept 15, 1995) without any court order. For the first month, I was kept in solitary confinement and then transferred to a cell packed with prisoners. The room was narrow and it was not well ventilated and to make things worse, there was a big can kept in one corner for urine. The smell was unbearable. I could only dicribe [sic] the condition as a hell on earth.

While under detention I was repeatedly interrogated and tortured. I was beaten on the sole of my feet, and all over my body. They pointed their guns on my head threatening to execute me. They coerced me to admit that I had recruited ex-army officers for Kefagne and the AAPO. They pressured me to give up names of Kefagne members. I denied the charges and challenged that I be confronted with evidence, but no evidence was produced. Eventually, I was released on bail of 5000 Birr. Before I was set free, I was told that the Addis Ababa public prosecutor's office would take over the investigation and would formally

bring criminal charges against me. I was twice summoned to the prosecutor's office where I was made to answer questions as part of the preliminary investigation. I asked the prosecutor in charge of the investigation if he could tell me the crimes he intends to charged me with. He said that I had committed "a serious political crime" but would not explain what the crime was. While my case was pending with the prosecutor's office, I continued association with Kefagne and on September 1996, I was given an assignment in Gondar. On September 24, 1996, I took the bus to Gondar with ten other volunteer ex-army members going to join the Kefagne forces. At the bus terminal in Gondar while we were disembarking, armed EPRDF militia arrived and ordered every passenger to get back inside the bus. Luckily, I and another colleague of mine were already out in the crowd. We immediately walked away and disappeared into the crowd. All of our comrades were arrested. After I met the Kefagne comrade in Gondar, I came back to Addis Ababa the next day. I did not return home for fear that I'd be arrested. I stayed in my friend's house and told my wife everything that had happened with warning not to tell anyone about my whereabouts.

In the mean time I began exploring ways and means of leaving the country. I contacted KEPF comrades but finally I was able to secure a passport and an exit visa through a friend who had government connections. After I processed my visa, it was communicated to me through KEPF channels that a comrade under torture had given up my name and that I should lose no time in going into hiding or leaving the country. Finally, I left Ethiopia on July 26, 1997. As soon as I left, the security office begun looking for me. They came home and searched my house for weapons and documents but found nothing. My wife

was repeatedly called to the security office where she was asked to give them a list of everyone she knew I contacted before I left. Among the names she gave, two ex-army officers that had nothing to do with KEPF were arrested. These two officers are still in prison.

Today in Ethiopia, the EPRDF government is facing a wide spread opposition from the people. Instead of solving problems democratically, the EPRDF had resorted to force and violence. The opposition forces such as Kefagne that have called for a peaceful solution to Ethiopian Political problems are now targets of EPRDF's persecution. These forces were left with no other choice but to resort to armed struggle. I would like to empasise [sic] that I do not believe in violence. I am for dialogue and peaceful resolution of problems. But if the government in power refuses to negotiate and resort to killings, torture and violence, I believe armed resistance is a legitimate defence [sic].

In conclusion I would like to point out that I would be a target of EPRDF's persecution because of my ethnicity, membership in Kefagne and my political opinion. I was detained, interrogated, threatened and falsely prosecuted. After I left my country, the EPRDF security had been looking for me and have even arrested my friends just because they are my friends and on suspicion that they were Kefagne members. From all these facts, it is very clear that my life would be in grave danger if I am forced to return back to Ethiopia. I am therefore hopeful that my application for asylum in the U.S. would be granted.

Negussu Demissie

Country Reports on Human Rights Practices for 1999

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ETHIOPIA

February 2000

Ethiopia continued its transition from a unitary to a federal system of government. Prime Minister Meles Zenawi leads the Government of the Federal Democratic Republic of Ethiopia (GFDRE), which was elected in 1995 to replace a transitional government established in the aftermath of a long and brutal civil war. Most opposition groups boycotted the elections. Candidates affiliated with the dominant party within the transitional government, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), won a landslide victory in national and regional elections. Although observers judged the elections to be generally free and fair, they cited irregularities. Officials affiliated with the dominant coalition, the EPRDF, control the Government, and the principal faction within the EPRDF remains Prime Minister Meles' Tigray Peoples' Liberation Front (TPLF). Federal regions, largely organized along ethnic lines, increasingly are autonomous and have a large degree of local control over fiscal and political issues. However, the relationship between the central Government and local officials and among various judiciaries lacks consistent coordination and occasionally actions are taken at the local level that conflict with stated federal policy. A long history of highly centralized authority, great poverty, civil conflict, and unfamiliarity with democratic concepts combine to complicate the implementation of federalism. The federal Government's ability to

protect constitutional rights at the local level is limited and uneven. Local administrative, police, and judicial systems remain weak throughout the country. The judiciary is weak and overburdened, but continued to show signs of independence.

Military forces that had been assigned to help police and local militia in the Gambella and Benishangul-Gomuz regions establish order, control banditry, and curtail rebel activities were redeployed to areas bordering Eritrea. Without the military's assistance, these areas once again have experienced a breakdown in law and order. There was increased internal military presence in some parts of the Somali region and Oromiya. Armed conflict between the military forces of Ethiopia and Eritrea along contested border areas resumed in February. In addition, military forces conducted an increased number of low-level operations against the Oromo Liberation Front (OLF), the Somalia-based Al'Ittihad terrorist organization, and elements of the Ogaden National Liberation Front (ONLF) both in the country and in southern Somalia and northern Kenya. The national police organization is subordinate to the Ministry of Justice. Some local officials and members of the security forces committed human rights abuses.

The economy is based on smallholder agriculture, with more than 85 percent of the estimated population of 61.7 million living in rural areas under very basic conditions. Agriculture accounts for approximately 80 percent of total employment. Per capita gross national product (GNP) is estimated at $130 per year. Real GNP growth was 2 to 3 percent. Total exports declined 18 percent to $494 million. The decline was due to a drop in the export value of coffee. Coffee accounted for 70 percent of the value of 1998 exports and 60 percent of 1999 exports. The conflict with

Eritrea has led to increased military spending. Military spending during the year was estimated to be $350 million. The Government continued to implement an economic reform program designed to stabilize the country's financial position, promote private sector participation in the economy, and attract foreign investment. In December the customs authority introduced a 10 percent surtax on most imports to raise funds for the war effort.

The Government's human rights record generally was poor; although there were improvements in a few areas, serious problems remain. Security forces committed a number of extrajudicial killings. In November security forces killed up to 10 persons in Sodo while suppressing widespread riots and demonstrations in protest of the imposition of a new language as a medium of instruction in schools. Security forces at times beat and mistreated detainees, and arbitrarily arrested and detained citizens. Prison conditions are poor, and prolonged pretrial detention remains a problem. The Government continued to detain persons suspected of sympathizing with or being involved with the OLF. The Government continued to detain and deport without due process Eritreans and Ethiopians of Eritrean origin. Since the outbreak of the border conflict in May 1998, more than 67,000 such persons have left Ethiopia for Eritrea; the vast majority were deported, although a small number left voluntarily. Another 1,200 male Eritreans and Ethiopians of Eritrean origin are being held in internment camps. Although prompted by national security considerations, the expulsions and detentions raised fundamental concerns regarding arbitrary arrest and detention, forced exile, the forcible separation of families, and nationality issues, as well as the hardships and financial losses suffered by

those who were detained or expelled. The judiciary lacks sufficient trained staff and funds, which limits its ability to provide citizens the full protection provided for in the Constitution. The Government continued to train additional civil and criminal judges and assigned them to regional courts. The Supreme Court reduced the number of judges required to hear a simple civil proceeding from three to one, thereby speeding up the provision of justice. The Government infringes on citizen's privacy rights, and the law regarding search warrants is widely ignored.

The Government restricts freedom of the press and continued to detain or imprison members of the press; however, fewer journalists were detained than in previous years. At year's end, eight journalists remained in detention, three of whom where charged with alleged involvement with terrorist activities. Approximately 45 journalists obtained bail during the year but still are subject to trial. Most were accused or convicted of inciting ethnic hatred, committing libel, or publishing false information in violation of the 1992 Press Law. Nevertheless, the private press is active and flourishing. Although the Government has not banned formally any newspaper or publication, the publication of some journals remains suspended due to the detention of editorial staff, and journalists continued to practice self-censorship. The Government at times restricted freedom of assembly. Despite Ministry of Education assurances to the contrary, the independent Ethiopian Teachers' Association (ETA) was not permitted to organize seminars in the regions. The Government limits freedom of association; however, the nongovernmental organization (NGO) registration process, which is slow and tedious, continued to improve. The Ethiopian Human Rights Council (EHRCO) was

registered after a 7-year effort, and the organization won a suit against the Government for blocking its bank accounts; however, the Government continues to refuse the registration of some NGO's. The Human Rights League (HRL), which was founded in 1997 by prominent Oromo civic leaders, has not been permitted to register, and its office records and equipment, confiscated by the Government in 1998, have not been returned. In June ETA secretary general Dr. Taye Woldesemayat [sic] was convicted and sentenced to 15 years imprisonment for treason. Four codefendants were given prison sentences ranging from 8 to 13 years. The sentences were much more severe than expected.

While in general the Government respects freedom of religion, on occasion local authorities infringed on this right. The Government restricted freedom of movement. In August Eritreans residing in Ethiopia and those Ethiopians of Eritrean origin who voted in the 1993 referendum on Eritrean independence were required to register with the SIRAA and issued 6-month residence permits. There were reports of the forced return of Djiboutian Afars who were not permitted to register as refugees. The border conflict with Eritrea, along with drought conditions in some areas, have displaced a large number of persons internally.

Violence and societal discrimination against women, and abuse of children remained problems, and female genital mutilation (FGM) is widespread. The National Committee on Traditional Practices in Ethiopia (NCTPE) reported in September 1998 that FGM occurs in 72.7 percent of the female population, down from 90 percent in 1990. The Government supports efforts to eliminate FGM and other harmful traditional practices; however, such practices are

widespread. The exploitation of children for economic and sexual purposes remained a problem. There are approximately 150,000 street children in urban areas, and their number is growing daily. Societal discrimination against disabled persons was a problem. Discrimination against religious and ethnic minorities persists. Child labor was a pervasive problem. Forced labor was also a problem, and there were some reports of trafficking in persons.

The Government's Special Prosecutor's Office (SPO) continued conducting the trials of persons accused of committing crimes under the brutal Marxist regime (1974-91) of Colonel Mengistu Haile Mariam. Charges have been brought against 5,198 persons. All have been indicted and arraigned, and the testimony of victims continues to be heard in open court. However, more than half of those accused are not in custody and were charged in absentia. Most SPO detainees have been held in custody for 7 or 8 years awaiting trial and judgment.

After extensive public consultations the House of People's Representatives (HPR) in October passed enabling legislation to meet the constitutional requirement to create a human rights commission and office of the ombudsman. The commission has full powers to receive and investigate all complaints of human rights violations made against any person. Neither entity was operational by year's end.

RESPECT FOR HUMAN RIGHTS

Section 1 Respect for the Integrity of the Person, Including Freedom From:

a. Political and Other Extrajudicial Killing

The security forces committed a number of extrajudicial killings. In June a youth attending the funeral of All

Amhara People's Organization (AAPO) founder Dr. Asrat Woldeyes was shot and killed by an undercover security officer who subsequently was arrested and charged for the crime. There were reports that in August security forces fired on a group of Somalis who were protesting the military's occupation of a Somali border town, killing two persons. There also were unconfirmed reports of extrajudicial killings by Government security forces from Oromiya and the Somali region.

Actions taken by the Government as part of the border conflict resulted in some civilian deaths. In February an Ethiopian plane bombed the Eritrean village of Laili Deda, killing at least five Eritrean civilians and wounding several others. There were reports that in April Ethiopian forces shelled the border town of Adi Keyih, killing at least eight Eritrean civilians and wounding dozens of others.

The Government announced a no-fly zone along its northern border soon after its military conflict with Eritrea began in May 1998. In August air defense forces shot down an unarmed civilian Learjet en route to South Africa from Italy when it violated the no-fly zone, killing two European nationals.

In November student protests against the arrest of two teachers who criticized new textbooks in the Welayita speaking sections of the Southern Nations, Nationalities, and Peoples' Region State (SNNPRS) led to widespread demonstrations and riots (see Sections 1.d. and 5). Special police units called in to suppress the riot killed up to 10 persons and wounded many others.

In March a 70-year old man accused of involvement with OLF terrorist activities died in prison (see Section 1.c.). In June Kebede Desta, a defendant charged along with 127

others for genocide (see Section 1.d.), died in prison of multiple chronic illnesses. Also in June, ETA acting secretary general Shimelis Zewidie [sic] died the same month of tuberculosis. Many international labor observers and ETA officials claim that Shimelis Zewdie's [sic] medical condition was exacerbated by a 75-day detention in late 1998.

The Government provided financial support to a coalition of Eritrean opposition groups based in Sudan, which laid landmines in Eritrea that resulted in several civilian deaths.

The outbreak of hostilities with Eritrea has led to Eritrean support of armed opposition groups that have been attempting to overthrow the Ethiopian Government. This has led to an increase during the year in armed attacks within Ethiopian territory by these groups operating mostly out of Somalia and Kenya. These attacks took the form of landmine incidents and hit-and-run attacks by guerrillas armed with small arms and grenades. In response the Government conducted military incursions into Somalia and around Kenya against these armed opposition groups. Some civilians and combatants were killed as a result of these attacks and in confrontations between government forces and the guerrillas, although the total number of deaths could not be confirmed.

In 1997 the federal High Court in Addis Ababa began the arraignment and prosecution of 5,198 persons formally charged with genocide and other war crimes, including extrajudicial killings, under the previous regime. Of the 5,198 persons charged, 2,246 were in detention, while the remaining 2,952 were charged in absentia. At year's end, witnesses still were being heard and evidence taken in the

ongoing trials. In November the federal High Court handed down a death sentence in absentia to Getachew Tebeka [sic], a former district governor and army lieutenant. Terba was convicted of ordering the detention, torture, and execution of five alleged opponents of the Derg Government, and is the first SPO defendant to receive the death penalty.

According to U.N. officials, Eritrean forces planted more than 50,000 landmines in the Badme area during their occupation of the territory. At least 10 civilians were killed by landmine explosions while attempting to return to their homes in the area.

In August and November, landmines derailed railroad engines pulling passenger trains outside Dira Dawa, killing at least four persons and injuring several others. Observers believe that the landmines were set by the radical Islamic group Al'Ittihad.

Banditry remained a serious problem in parts of the country. Bandits, often heavily armed, killed civilians, police, and soldiers during robberies and attempted robberies. Most evidence suggests that their motives primarily were economic.

There were unconfirmed reports that in November Eritrean forces killed 17 Ethiopian Afar civilians during a cross border attack.

b. Disappearance

There were no confirmed reports of disappearances perpetrated by the Government, although both domestic and international human rights groups claim that there were many politically motivated disappearances.

In 1997 the federal High Court in Addis Ababa began the arraignment and prosecution of 5,198 persons charged with genocide and other war crimes under the previous regime, including the disappearance of 14,209 persons (see Section 1.a.).

In January a foreign aid worker was kidnaped in the Somali region by unknown persons and taken to Somalia where he was released unharmed. In April unknown gunmen reportedly kidnaped three persons, including a foreign aid worker, in the Ogaden region.

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Constitution prohibits the use of torture and mistreatment; however, there were credible reports that security officials sometimes beat or mistreated detainees. Government media published occasional reports of officials who were jailed or dismissed for abuse of authority and violations of human rights.

In November police injured many persons and killed up to 10 others while suppressing riots in the SNNPRS (see Sections 1.a., 1.d. and 5).

There was an increase during the year in armed attacks within Ethiopian territory by Eritrean-supported opposition groups operating mostly out of Somalia and Kenya (see Section 1.a.). These attacks have taken the form of landmine incidents and hit-and-run attacks by guerrillas armed with small arms weapons and grenades.

Prison conditions are poor and overcrowding remains a serious problem. Prisoners often are allocated fewer than 21.5 square feet of sleeping space in a room that may contain up to 200 persons. Prison food is inadequate, and

many prisoners have food delivered to them every day by family members or use their own funds to purchase food from local vendors. Prison conditions are unsanitary, and access to medical care is not reliable. Prisoners typically are permitted daily access to prison yards, which often include working farms, mechanical shops, and rudimentary libraries. Visitors are permitted. Prison letters all must be written in Amharic, making outside contact difficult for non-Amharic speakers; however, this restriction is not enforced. Female prisoners are housed separately from men, and rape does not appear to be a problem.

Several prisoners and detainees died during the year due to illness and disease (see Sections 1.a. and 1.d.).

In May six detainees suspected of involvement in terrorist activities staged a 10-day hunger strike to protest the prison policy of keeping them in handcuffs 24 hours a day (see Section 1.d.). Another 3-day prison wide hunger strike in protest of prolonged court proceedings took place in Kaliti prison in June.

The army used military camps located near Zewaye Goba in Bale zone, Oromiya for the temporary detention and interrogation of OLF fighters and alleged supporters.

In June approximately 1,200 internees of Eritrean origin and 172 prisoners of war were moved from the Bilate detention camp to the Dedesa internment camp in western Oromiya. The new camp is in an area less prone to malaria. In July approximately 350 Eritrean prisoners of war (POW's) were moved from the Tigray region to the Dedesa internment camp.

The Government permits independent monitoring of prison conditions and police stations by the ICRC and by diplomatic missions. The ICRC, in general, had access to federal and regional prisons, civilian detention facilities, and police stations throughout the country; however, after a July visit, the Government refused to allow the ICRC access to the Central Investigation Division (CID) detention facility in Addis Ababa, which holds upwards of 200 persons whose cases are under investigation. Furthermore, the ICRC was unable to gain access to police stations in Addis Ababa where ethnic Eritreans are believed to be detained. The ICRC had restricted access to military detention facilities in the east and the southeast, where suspected OLF fighters are held.

The Government generally permitted the International Committee of the Red Cross (ICRC) access to detention facilities holding Eritrean POW's. The ICRC also regularly visited civilian Eritrean nationals and Ethiopians of Eritrean origin being detained on national security grounds. However, in February the Government instructed ICRC staff to leave the Tigray region. In April ICRC staff were permitted to visit POW's held in Tigray; however, the ICRC was not permitted to resume its program in Tigray until August.

Government authorities permitted diplomats to visit prominent detainees held by the SPO for alleged involvement in war crimes and terrorist activities. These detainees include former Derg housing ministry official and governor of Sidamo, Abera Yemane-Ab, 1968 Olympic marathon winner Mamo Wolde, and former Addis Ababa University President Dr. Alemayehu Tefera. ETA secretary general Dr. Taye Woldesemayat, now serving a 15-

year sentence for plotting violent insurrection, also is permitted visitors from the diplomatic community.

d. Arbitrary Arrest, Detention, or Exile

The Constitution and both the criminal and civil codes prohibit arbitrary arrest and detention; however, the Government does not always respect these rights in practice.

Under the Criminal Procedure Code, any person detained must be charged and informed of the charges within 48 hours and, in most cases, be offered release on bail. Those persons believed to have committed serious offenses may be detained for 15 days while police conduct an investigation, and for additional 15-day periods while the investigation continues. Some offenses, such as murder and treason, are not bailable. In practice, and especially in the outlying regions, authorities regularly detain persons without a warrant, do not charge them within 48 hours, and – if persons are released on bail – never recall them to court. Thousands of criminal suspects remained in detention without charge, most of whom were accused of involvement in OLF terrorist activities. Often these lengthy detentions are due to the severe shortage and limited training of judges, prosecutors, and attorneys.

Federal and regional authorities arrested and detained persons without charge or trial for activities allegedly in support of armed opposition groups. The vast majority of these incidents took place in the Oromiya and Somali regional states. More than 7,500 persons allegedly associated with armed opposition groups remain in detention. Most detainees were accused of participating in armed actions by the OLF or the ONLF. In typical cases, security forces arrested and held these persons incommunicado for

several days or weeks before eventually releasing them. The closed trial of 65 Oromos suspected of involvement in OLF terrorist acts continued. In March one of the Oromo defendants who was 70 years of age died while in jail. In April three other defendants were granted bail. Six of the defendants staged a 10-day hunger strike in May to protest the prison policy of keeping them in handcuffs 24 hours a day.

Thirty-one AAPO officials and supporters, most detained since 1994, were convicted on treason charges in March. They were convicted of inciting an armed uprising and promoting civil war. Four of the individuals, an elderly defendant, two women, and a youth, received 4-year sentences and were released for time served. The remaining 27 received sentences ranging from 5 to 20 years.

In response to attacks by armed opposition groups operating out of Somalia and Kenya (see Sections 1.a. and 1.c.), the Ethiopian military has conducted operations in and around the areas bordering Somalia and Kenya. These operations have resulted in the capture and detention of hundreds of opposition fighters and their suspected supporters on both sides of these borders during the year.

A total of nine journalists were detained during the year, of whom, two remained in prison at year's end because they could not meet bail requirements (see Sections 1.e. and 2.a.). In April Samson Seyoum, the former editor in chief of two now defunct weekly independent newspapers who had been detained since December 1995, was sentenced to 4 1/2 years' imprisonment on charges of incitement to war and attempting to spread Islamic fundamentalism (see Section 2.a.). In May another editor in chief was sentenced to 1 year and 1 month in prison for

libel but was released in July for time served (see Section 2.a.).

In December 1997, the trials began of three of the five journalists and editors associated with the opposition newspaper Urjii, who were arrested in October and November 1997 for violating the press law and for alleged involvement in OLF terrorist activists. The arrests of the journalists occurred without warrants, and the detainees were held incommunicado for up to a month. One of the detainees, charged only with violating the press law, was released on bail in December 1998; his trial was pending at year's end. The fifth detainee was convicted of violating the press law and sentenced to a year in prison, but five other charges still are pending against him (see Section 2.a.).

In December the Government arrested up to 26 Nuer tribal political activists associated with the Gambella People's Democratic Congress (GPDC) (see Sections 3 and 5). Some of the activists were arrested for inciting Nuer students in November to demonstrate for the use of the Nuer language in school (see Section 2.b.), while others were arrested on suspicion of supporting the OLF. All of the activists remained in detention at year's end.

On November 6, police arrested two teachers in Sodo in the SNNPRS for objecting to the use of a new language in student textbooks (see Section 5). Student demonstrations against the arrests led to widespread week-long demonstrations and riots. Special police units brought in to suppress the demonstrations killed up to 10 persons, injured hundreds and arrested up to 1,000 others (see Sections 1.a, 1.c., and 5). A former Young Men's Christian

Association camp in Sodo was used as a temporary detention facility for hundreds of demonstrators. At year's end, between 70 and 120 persons remained in detention in prisons in the Sodo area, including several elders from the Welayita community.

In March 1997, the SPO formally charged 128 defendants with politically motivated genocide dating back to the 1976 "red terror." In December 1998, the SPO began presenting prosecution testimony in the case of former Addis Ababa University President Alemayehu Tefera, imprisoned since 1993, although the charges on which he originally had been detained were dropped the same year. His petition to separate his case from the 127 other defendants was denied (see Section 1.a.). The court also started hearing testimony in December 1998 on the case of former Olympic marathon champion Mamo Wolde, who was charged with genocide for the state-sponsored killing of 14 teenagers during the prior regime. Wolde has been detained since 1992. In June the trial of ETA secretary general Dr. Taye Woldesemayet [sic] concluded with a conviction for treason and alleged involvement in an underground terrorist organization. He was sentenced to 15 years in jail. In handing down the sentence the court referenced two alleged terrorist acts that had been dropped from the list of charges against Dr. Woldesemayet [sic] during the trial. Four other SPO defendants also were convicted and given sentences ranging from 8 to 13 years. The sentences were much more severe than expected. In June another SPO defendant, Kebede Desta, died in prison of multiple chronic illnesses, and ETA acting secretary general Shimelis Zewidie died the same month of tuberculosis (see Sections 1.a. and 1.c.).

Opposition groups allege that some of the persons detained by the SPO, as well as some others, are held for political reasons. The Government denies that it holds persons for political reasons.

In February 39 Eritrean exchange students held in Bilate detention camp since July 1998 were released and flown by chartered aircraft to Asmara, Eritrea.

Civilian residents of Eritrean origin have been detained since the outbreak of hostilities between Ethiopia and Eritrea. The Government justified these detentions on grounds of security. Approximately 1,200 civilian residents of Eritrean origin remained detained in internment camps at year's end. There were credible reports that hundreds of others were held in police stations for months prior to being deported. The ICRC was not granted access to detainees allegedly held in police stations. A total of 512 Eritrean POW's captured in fighting between Ethiopia and Eritrea remained detained at year's end. Beginning in April, authorities began releasing Eritrean detainees if they could obtain visas to a country other than Eritrea. Approximately 90 detainees have left Ethiopia, mostly to other African countries, particularly Uganda and Malawi. In early August, 25 Eritrean detainees obtained fraudulent travel documents and left Ethiopia to Malawi on a scheduled airline flight. They were detained in Malawi where they refused an offer of transit to Eritrea. The Malawian authorities then forcibly returned the former detainees to Ethiopia. One former detainee was killed and at least six were wounded in a confrontation with Malawi authorities (see Section 2.d.).

Exile is illegal, and the Constitution provides that citizens shall not be deprived of their nationality against their

wills; however, since the outbreak of conflict with Eritrea in May 1998, the Government has detained and deported more than 67,000 Eritreans and Ethiopians of Eritrean origin on national security grounds. Some of the deportees were voluntary returnees who had requested return to Eritrea; however, the vast majority were deported forcibly. Deportation orders originated from the Security, Immigration, and Refugee Affairs Authority in Addis Ababa. The Government's actions raised serious issues of due process since there were no preliminary hearings to determine the merits of the deportations, no right to counsel was provided to detainees, and detainees only had a very circumscribed opportunity to register protests. In addition, the issue of the nationality of Eritrean-origin Ethiopians has not been settled yet. Heads of households were taken without warning, detained, and often deported via overland routes within 48 hours. Remaining family members were given arbitrary deadlines to sell property and sometimes were subjected to departure taxes based on estimated annual income and unpaid balances on government bank loans. The ICRC monitored most border crossings until September when government notification to the ICRC ceased. Since September 4,000 Eritreans and Ethiopians of Eritrean origin were deported, reportedly without provision for their safety, hygiene, sanitation, or food. Some of these deportees were hospitalized upon reaching Eritrea. In August all Eritreans and Ethiopians of Eritrean origin over 18 years of age who had taken part in the 1993 referendum on Eritrean independence were required to register with the Security, Immigration, and Refugee Affairs Authority (SIRAA) and complete residence application forms. After registration, applicants received identity cards and residence permits valid for 6 months (see Section 2.d.).

e. Denial of Fair Public Trial

The Constitution provides for an independent judiciary; however, the judiciary is weak and overburdened. Although the federal and regional courts continued to show signs of judicial independence, in practice severe shortages of adequately trained personnel in many regions, as well as serious financial constraints, combined to deny many citizens the full protections provided for in the Constitution.

Consistent with the Constitution, the Government continued to decentralize and restructure the judiciary along federal lines with the establishment of courts at the district, zonal, and regional levels. The federal High Court and federal Supreme Court hear and adjudicate original and appeal cases involving federal law, transregional issues, and national security. The regional judiciary is increasingly autonomous, with district (woreda), zonal, high, and supreme courts mirroring the structure of the federal judiciary. The Government has delegated some of the war crimes trials to the supreme courts in the regions where the crimes allegedly were committed.

The Constitution provides legal standing to some preexisting religious and customary courts and gives federal and regional legislatures the authority to recognize other courts. By law, both parties to a dispute must agree before a customary or religious court may hear a case. Shari'a (Islamic) courts may hear religious and family cases involving Muslims. In addition, some traditional courts still function. Although not sanctioned by law, these courts resolve disputes for the majority of citizens who live in rural areas and who generally have little access to formal judicial systems.

The outbreak of hostilities between Ethiopia and Eritrea adversely impacted the military justice system. Most foreign assistance to train officers and noncommissioned officers was suspended at the same time that the rapid expansion of the military greatly increased the need for trained military lawyers and judges. The military's involvement in the detention of opposition fighters and their suspected supporters has constrained further its badly overburdened justice system.

The Constitution provides that persons arrested have the right to be released on bail. In most cases, bail is set between approximately $125 (1,000 birr) and approximately $1,250 (10,000 birr). At year's end, two journalists were being held in prison, since they could not meet these bail requirements. Certain offenses such as capital crimes are not bailable.

Authorities detained hundreds of persons without charge for supposed involvement with the OLF and the ONLF (see Section 1.d.). Such cases often reflect arbitrary actions on the part of local officials but also result from an overburdened and cumbersome judicial system marked by a shortage of trained and competent prosecutors and judges.

Regional offices of the federal Ministry of Justice monitor local judicial developments, but the federal judicial presence in the regions is limited. Anecdotal evidence suggests that some local officials interpret decentralization to mean that they no longer are accountable to any higher authority, even within their own regions. For example, local government officials throughout the country ignored instructions from the National Electoral Board (NEB) on the acceptance of candidate endorsement signatures from opposition party candidates.

To remedy the severe lack of experienced staff in the judicial system, the Government continued to identify and train lower court judges and prosecutors, although officials acknowledge that the pay scale offered must be increased significantly to attract the required numbers of competent professionals. Senior government officials charged with judicial oversight estimate that the creation of a truly independent and skilled judicial apparatus would take decades. The Government has welcomed foreign financial and technical assistance to accelerate this process.

Pending passage by regional legislatures of laws particular to their region, all judges are guided exclusively by the federal procedural and substantive codes.

According to the Constitution, accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged. Accused persons have the right to be represented by legal counsel of their choice. However, in practice, lengthy pretrial detention was common, closed proceedings occurred, and at times, detainees were allowed little or no contact with their legal counsel. The Public Defender's Office provides legal counsel to indigent defendants, although its scope remains severely limited, especially with respect to SPO trials. The law does not allow the defense access to prosecutorial evidence before the trial.

The SPO was established in 1992 to create a historical record of the abuses committed during the Mengistu Government and to bring to justice those criminally responsible for human rights violations. The federal High Court has considered the cases of 2,658 defendants accused of genocide, war crimes, and aggravated homicide. Trials began in 1994 and continue; however, the process is

subject to frequent and lengthy adjournments. Court appointed attorneys, sometimes with inadequate skills and experience, represent many of the defendants, following claims that they could not afford an adequate defense. Of the 5,198 defendants, the Government is trying 2,952 in absentia, including former dictator Colonel Mengistu Haile Mariam, who returned to exile in Zimbabwe after a brief visit during the year to South Africa for medical treatment. All the defendants in custody appeared before the court during the year with many defendants charged and tried collectively in each instance. Most cases still were in progress at year's end. No SPO defendant has been released on bail, although 33 defendants have been released for lack of evidence. A number of defendants have been convicted, including Lieutenant Getachew Tekeba [sic], who was sentenced to death in absentia (see Section 1.a.), and Colonel Zeleke Zerihun, who received a 15-year sentence for genocide and crimes against humanity. In July the Minister of Agriculture of the prior regime, Dr. Geremew Debele, received an 8-year sentence on charges related to abusing employees of the central slaughterhouse. The court cleared him of murder charges. He was released for time served but his political rights reportedly are limited for the next 3 years.

f. Arbitrary Interference with Privacy, Family, Home or Correspondence

The law requires judicial search warrants; however, they seldom are obtained outside of Addis Ababa in practice.

There were credible but unconfirmed reports that in certain rural areas local officials used threats of land redistribution to enforce support for the ruling coalition. There also were credible reports that teachers and other

government workers have had their employment terminated if they were not of the dominant ethnic group in their region (see Section 5).

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The Constitution and the 1992 Press Law provide for the freedom of free speech and of the press; however, the Government used legal and other mechanisms to restrict these rights in practice. The Government continued to prosecute journalists and editors for publishing articles that violated the Press Law, and some journalists practiced self-censorship. Nonetheless, the private press was very active and often published articles extremely critical of the Government.

The Government uses provisions of the Press Law concerning publishing false information, inciting ethnic hatred, and libel to justify the arrest of journalists. The number of journalists in prison dropped from 15 at the beginning of the year to 8 at year's end: a total of 9 journalists were detained during the year, including 2 who remained in detention at year's end. Most of the journalists detained were accused of violating the Press Law.

Five journalists of the Oromo-oriented private weekly "Urjii", arrested in October and December 1997, are among the group of 65 Oromos indicted for involvement in OLF terrorist activities (see Section 1.d.). Three of these journalists remain in prison and also are on trial for press law violations. In March the acting editor in chief of Urjii, Alemu Tolossa, was released after paying bail of approximately $125 (1,000 birr). Former Urjii publisher and secretary general of the Human Rights League, Garoma

Bekele, was convicted on one count of violating the press law and, in May, was sentenced to 1-year's imprisonment. Five other Press Law charges are pending against him.

Two journalists detained for violating the Press Law remain in jail because they cannot meet bail (see Section 1.e.). Approximately 45 journalists who obtained bail still are subject to trial for violations of the Press Law.

In April Samson Seyoum, former editor in chief of Agere and Tequami, now defunct weekly independent newspapers, was sentenced to 4 1/2 years' imprisonment on charges of incitement to war and attempting to spread Islamic fundamentalism. This is the longest sentence handed down to any journalist in the country. Seyoum had been detained since December 1995. In August the court released Samson Seyoum pending appeal of his conviction. In May Fisseha Alemu, editor in chief of the newspaper Tarik, was sentenced to 1 year and 1 month in prison for libel. In July he was released for time served.

In December the editor in chief of the Amharic-language newspaper Tobia was given a 6-month suspended sentence for publishing an article allegedly inciting ethnic animosities against Tigrayans.

In May and June, three newspaper editors, Abonesh Aberra and Sisay Agena of Ethop [sic], and Dawit Taye, former editor in chief of Aemero, both independent weekly newspapers, were found not guilty and acquitted of Press Law violations. The charges related to news reports and editorials on the assassination attempt against Egyptian President Hosni Mubarak in Addis Ababa in June 1996 that were critical of Ethiopian security.

However, despite the overhanging threat of legal action, the private press is still very active. Many private newspapers continue to publish false information, unsubstantiated stories, and harsh antigovernment articles without any official sanction. The Government has not banned any newspaper or publication. The office of the government spokesperson was created in 1998 as a temporary entity responsible for distributing press releases on the border conflict with Eritrea to the Ethiopian news agency, foreign news agencies, foreign embassies, and international organizations. The Government continued to bar some private newspapers and news organizations from attending government briefings and press conferences, and most government officials still refuse to meet with private journalists.

The Ethiopian Free Press Journalist's Association (EFPJA), which consists of 80 members from the private press, has been trying for 5 years to gain Ministry of Justice approval for its registration as a professional association, without success (see Section 2.b.).

Although most independent newspapers have supported the Government's position on the conflict with Eritrea, the private press remained confrontational and continued to publish articles extremely critical of the Government and continued to report on human rights abuses.

According to the Constitution, citizens generally are free to discuss publicly any topic they choose; however, on occasion the Government restricted this right in practice. The Government opposed the activities and operations of groups critical of the Government such as the ETA and the HRL (see Sections 2.b. and 4), and arrested two teachers who criticized a new government education policy (see

Sections 1.d. and Section 5). Nevertheless, several groups critical of the Government held press conferences and public meetings without retribution. For example, in June EHRCO held a news conference that was covered by both government and private news media, and in November Parliament invited opposition political parties to appear on a political panel with EPRDF leadership, during which opposition criticism of government policy was reported on national radio and television.

Because of a high illiteracy rate and extreme poverty, only about 1 percent of citizens regularly read any newspaper or magazine. While the literacy rate for persons over 10 years of age in Addis Ababa is 82.5 percent, the overall literacy rate is only 23.4 percent. Furthermore, private newspapers are not circulated widely outside the capital and, as a result, citizens outside of Addis Ababa have extremely limited access to the print media.

There are 27 independent Amharic language weekly newspapers and 6 independent English language weekly newspapers with an estimated total circulation of 144,000. There are 5 EPRDF coalition party newspapers, published in Amharic, Tigrigna, and Oromiffa languages, with a total circulation of 120,000.

Nearly all private newspapers as well as state newspapers are printed at one of the state-owned printing presses, but there were no reports of problems printing any newspapers or magazines. The Ministry of Information and Culture requires that newspapers show a bank balance of approximately $1,250 (10,000 birr) at the time of their annual registration for a license. In December the Ministry reportedly ordered 12 newspapers, including 4 weekly

independent political newspaper, to close when they were unable to show sufficient bank assets.

While much of the private press continues to lack professionalism in its reporting, some print media are developing into more responsible publications. Others actually are opposition newsletters that often purvey unsubstantiated criticism of the Government. Several are tied to distinct ethnic groups, especially the Amharas and Oromos, but severely criticize the Government for being ethnocentric. Newspapers critical of government leaders and their policies are available widely in the capital but scarce elsewhere.

Foreign journalists continued to operate freely and often wrote articles critical of government policies. They or their local affiliates were granted greater access to government officials than were local independent journalists. A number of foreign journalists were allowed to go to the war front under restricted circumstances. About 10 Ethiopian affiliates of foreign news agencies also were permitted to go to the war front in February and August to visit liberated areas and Eritrean prisoners of war. Local journalists representing privately owned newspapers were denied access to the war front.

Radio remains the most influential medium for reaching citizens, especially those who live in rural areas. The Press Law allows for private radio stations, but there only are two nongovernmental radio stations in operation: Radio Fana, a station controlled by the ruling EPRDF coalition, and the Tigray People's Liberation Front (TPLF) radio, which broadcasts in the Tigrigna language from Mekele. The Government operates the sole television station, and news is controlled tightly. However, there are no restrictions on

access to international news broadcasts. Ownership of private satellite receiving dishes and the importation of facsimile machines and modems are permitted. Internet access is unrestricted. During the year, the Government issued regulations providing for the licensing of private Internet service providers; however, no private Internet service providers were operating at year's end. Private satellite transmission uplinks are not allowed, even for international organizations.

In June the Government issued a broadcast proclamation creating a broadcasting authority to review applications for private radio and television licenses; however, there were delays in promulgating the proclamation and establishing the authority. The broadcast proclamation prohibits political parties and religious organizations from owning stations; foreign ownership also is prohibited.

The official media, including broadcast, wire service, and print media, legally are autonomous and responsible for their own management and partial revenue generation, although they continue to receive government subsidies. Government reporters practice self-censorship, but at times questioned official policies. The Government's press and information department acts as an official spokesperson and implemented the 1996 Information Policy, which guides contacts among the Government, the press, and the public.

Academic freedom is respected; however, in general, political activity is not encouraged on university campuses. The Ministry of Education has approved the charter for the country's first private university, Unity College. This 4-year college is to offer a complete bachelor's degree program, including a major in journalism.

Despite government assurances that Addis Ababa University would not be affected by the conflict with Eritrea, in 1998 the institution dismissed nine Ethiopian academics of Eritrean origin. In addition, in 1998 the authorities detained approximately 82 Eritrean exchange students early in the hostilities. Most of the students were released in 1998, and in February the last 39 students were released and returned to Eritrea (see Section 1.d.).

b. Freedom of Peaceful Assembly and Association

The Constitution provides for the right of peaceful assembly; however, on occasion the Government restricted this right in practice. Organizers of large public meetings or demonstrations must notify the Government in advance and obtain a permit. While there were no reports that any permits were denied, there were long unexplained delays in issuing permits, which hindered the ability of groups to organize events. EHRCO and some opposition political parties reported that they had difficulties renting halls from local government officials. The ETA was not permitted to organize seminars in the regions, despite Ministry of Education assurances in 1998 that it would be allowed to do so.

In January the Coalition of Ethiopian Opposition Political Organizations held a rally in Addis Ababa to announce its political agenda. The rally was attended by fewer than 3,000 persons. The organizers stated that they were unable to organize properly for the event because local authorities did not approve their permit for the rally until the day before the event was to occur. Both the government and private press covered the rally.

In November student demonstrations against the arrest of two teachers who criticized new textbooks in the Welayita

speaking sections of the Southern Nations, Nationalities, and Peoples' Region State (SNNPRS) led to widespread demonstrations and riots during which police killed up to 10 persons, injured hundreds, and arrested and detained as many as 1,000 others (see Sections 1.a., 1.c. 1.d. and 5).

In November Nuer students in the Gambella region demonstrated for the use of the Nuer language in schools (see Section 5). In December the Government arrested up to 26 Nuer tribal political activists and leaders associated with the GPDC on charges of inciting the Nuer students to demonstrate (see Sections 1.d. and 5.).

The Constitution provides for freedom of association and the right to engage in unrestricted peaceful political activity; however, the Government limits this right in practice. The Government changed its procedures for registration of NGO's in 1996, and the NGO registration process has improved significantly over previous years; however, a number of policy issues regarding NGO's remain unresolved, and the NGO registration process still is extremely slow. Primary registration rests with the Ministry of Justice. EHRCO was granted registration as an NGO in June, after a 7-year effort. However, the Ethiopian Free Press Journalist's Association (EFPJA), which consists of 80 members from the private press, has been trying for 5 years to gain Ministry of Justice approval for its registration as a professional association, without success. The Ministry of Justice recognizes the Ethiopia Journalists' Association (EJA), which represents journalists working for government-owned media.

Authorities closed the offices of the HRL in April 1998, on the grounds that some HRL board members wished to use the organization as a front for the OLF. Board members

denied any connection to the OLF. The HRL had been operating without a license, but it had fulfilled the prerequisites for licensing and had been waiting for over a year to get a license (see Section 4). The government investigation of the HRL was ongoing at year's end, and the contents of its office, confiscated by the Government in 1998, have not been returned.

The Government requires political parties to register with the NEB. Parties that do not participate in two consecutive national elections are subject to deregistration. Registered political parties also must receive permission from regional governments to open local offices. The opposition AAPO complained that the Oromiya regional government has refused its application to open branch offices in the region. There are 58 organized political parties. Of these, eight are national parties, and the remainder operate only in limited areas. In June a European diplomat received an official reprimand from the Ministry of Foreign Affairs for inviting a registered political party to meet with the international donor working group to discuss preparations for elections in 2000 (see Section 3).

c. Freedom of Religion

The Constitution provides for freedom of religion; however, while the Government generally respects freedom of religion in practice, on occasion local authorities infringed on this right.

The Government requires that religious groups be registered. Religious institutions, like NGO's, are registered with the Ministry of Justice and must renew their registration every year. Unlike NGO's, religious groups are not subject to a rigorous registration process. Two religious

organizations reportedly have refused to comply with the government requirement that they register, without consequence. Under current law, a religious organization that undertakes development activities must register its development wing separately as an NGO. The Government does not issue work visas to foreign religious workers unless they are attached to the development wing of a religious organizations. Religious groups are not accorded duty-free status, but they are given free government land for churches, schools, hospitals, and cemeteries. Religious groups, like private individuals or businesses, must apply to regional and local governments for land allocation. An interfaith effort is underway to promote revision of the law, since it affects the duty-free status of religious groups.

In March Jehovah's Witnesses received a letter of apology from a court in Tigray for actions taken in 1998 by local officials to disrupt a religious service and the temporary detention of some 50 believers. There are more than 3,000 members of Jehovah's Witnesses in the country. When the Government began deporting Eritreans and Ethiopians of Eritrean origin in 1998, it decided that members of Jehovah's Witnesses of Eritrean origin, who might face religious persecution in Eritrea, were not to be subject to deportation. Approximately 100 members of Jehovah's Witnesses from Eritrea were permitted to remain in the county despite their Eritrean nationality.

There was a credible report that local officials extorted medical supplies from a clinic operated by a religious organization for sale on the black market. The officials threatened to cancel the NGO registration of the clinic if they did not cooperate.

Evangelical leaders have complained of strict regulations on the importation of bibles, as well as heavy customs duty on bibles and other religious articles; however, bibles and religious articles are subject to the same customs duty as are all imported books and most imported items.

There were some instances of conflict among religious groups, most noticeably between Orthodox Christians on the one hand, and evangelicals and Pentecostals on the other. While some Pentecostals and evangelicals complained in past years that the police failed to protect them adequately during instances of interreligious conflict, there were no complaints of inadequate police protection during the year. In most interreligious disputes, the Government maintains neutrality and tries to be an impartial arbitrator. Some religious leaders have requested the establishment of a federal institution to deal with religious groups. The Government considered the request, but had taken no action to establish such a federal institution by year's end.

The Constitution requires the separation of church and state. The Government has interpreted this constitutional provision to mean that religious instruction is not permitted in schools, whether they are public or private schools. Catholic, Orthodox, evangelical and Muslim-owned and operated schools are not permitted to teach religion as a course of study. Most private schools teach a morals course as part of the school's curriculum, and the Government Education Bureau in Addis Ababa has complained that such courses are not free of religious influence. Churches are permitted to have Sunday schools, the Koran is taught at mosques, and public schools permit the formation of clubs, including those of a religious nature.

Muslim leaders complained that public school authorities sometimes interfered with their free practice of Islam. Certain public school teachers in the SNNPRS, Addis Ababa, and in the Amhara region objected to Muslim schoolgirls covering their heads with scarves while at school. In February a school in Woldea in the Amhara region closed for 3 weeks when Muslim girls insisted on wearing their headscarves to class. In April Muslim leaders complained that Addis Ababa University refused to serve food appropriate for the Muslim Eid feast to Muslim students. When three Muslim students complained, the university expelled them.

Protestant groups occasionally complained that local officials discriminate against them when seeking land for churches and cemeteries. Evangelical leaders complain that because they are perceived as "newcomers" they remain at a disadvantage compared with the Ethiopian Orthodox Church and the Supreme Islamic Council when it comes to the allocation of land.

d. Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation

The Constitution provides for freedom of movement, including the right of domestic and foreign travel, emigration, and repatriation; however, the Government restricted these rights in practice. In principle, citizens can freely change their residence or workplace; however, since the outbreak of the border conflict with Eritrea in May 1998, Eritreans and Ethiopian citizens of Eritrean origin were subjected to detention and deportation to Eritrea. By year's end, more than 67,000 such persons had been compelled to leave or had left Ethiopia for Eritrea; the vast majority were deported, although a small number left the

country voluntarily to join family members who were deported(see Section 1.d.). It is estimated that more than 200,000 Eritreans and Ethiopians of Eritrean origin remain in Ethiopia. In August the Government decreed that all Eritreans, 18 years of age and above residing in Ethiopia who either had taken part in the 1993 referendum on the independence of Eritrea from Ethiopia or who had been granted Eritrean citizenship, had to register as aliens with the SIRAA immediately. Those registering would be issued an identity card and given a 6-month residence permit; however, this permit does not permit individuals access to hospitals or other public services. The Ethiopian passports of residents of Eritrean origin routinely were confiscated or restricted in use for a single exit and no reentry.

Beginning in April, the Government adopted a policy of releasing those Eritrean detainees from the Bilate and Dedesa internment camps who could obtain visas to a country other than Eritrea. Approximately 90 detainees took advantage of this opportunity, with most going to African countries, particularly Uganda and Malawi. In August 25 detainees obtained fraudulent Malawian visas and traveled to Malawi with government-issued laissez-passers. They were returned forcibly to Ethiopia after refusing an offer to travel to Eritrea. One former detainee died and at least six others were wounded in a confrontation with Malawi police. The Government reportedly reacted to this incident by deciding not to permit detainees to depart for countries in Africa.

The law requires citizens and residents to obtain an exit visa before departing the country. Eritreans and Ethiopians of Eritrean origin have been able to obtain exit visas but often are not permitted to return to the country.

In Addis Ababa and western Gondar in the Amhara region there are very small concentrations of Ethiopian Jews (Falashas) and those who claim that their ancestors were forced to convert from Judaism to Ethiopian Orthodoxy (Feles Mora). Approximately 3,000 Feles Mora migrated voluntarily from the western Amhara region to Addis Ababa in 1991 at the time of "Operation Solomon," when a large number of Falashas were airlifted to Israel. The Feles Mora also seek to immigrate to Israel. The number of Feles Mora in the country is approximately 9,000. Israeli officials evaluate the Feles Mora immigration claims on a case-by-case basis and estimate that approximately 20 percent of the Feles Mora eventually may be eligible to immigrate under Israel's law of return. In June the Israeli Government announced that 3,500 Falashas requesting citizenship would be airlifted from Quara, Ethiopia to Israel, and in [sic] July 6 Israeli officials went to Gondar to process applications. All the eligible Falashas in Quara left for Israel by year's end.

As a result of the border dispute with Eritrea, approximately 343,000 persons have been displaced internally. The Government has presented relief and rehabilitation proposals for these internally displaced persons to bilateral donors and NGO's.

The law includes provisions for the granting of refugee and asylee status in accordance with the provisions of the 1951 U.N. Convention Relating to the Status of Refugees and its 1967 Protocol. The Government generally treats asylum seekers fairly and cooperates with the UNHCR and other humanitarian organizations in assisting refugees and returning citizens. However, there were reports of the forced return of Djiboutian Afars who were not permitted to register as refugees.

Ethiopia hosts 261,661 refugees; most are from Somalia and Sudan. The Government, in cooperation with UNHCR, continues to provide first asylum to refugees from Sudan and Somalia. Along the border of northwest Somalia 195,345 Somali refugees were settled in eight camps, down from 600,000 in 1996. Along the Sudanese border 58,600 Sudanese refugees were settled in four refugee camps around Gambella and Asossa at year's end. Approximately 80 percent of the Sudanese refugees are women and children. There are approximately 1,500 Djiboutian Afar asylum-seekers remaining in the country, down from a high of 18,000 when Djiboutian Afars first entered the country in 1993. These asylum seekers have requested but never were granted formal registration by the Ethiopian Agency for Refugee and Resettlement Affairs (ARRA). Negotiations began in 1997 between the Government and the UNHCR concerning their status and were ongoing at year's end. ARRA conducted an informal registration of Djiboutian Afars in May without UNHCR involvement.

In June Kenya repatriated 1,388 Ethiopians from refugee camps. In October the Government began repatriating 4,700 Kenyans from the Moyale refugee camp; however, approximately 550 Kenyan refugees were turned away at the Kenyan border due to a lack of proper identification and were returned to the camp. They had not been repatriated by year's end. During the year the UNHCR repatriated approximately 15,000 Somalian refugees to northwest Somalia.

Section 3 Respect for Political Rights: The Right of Citizens to Change their Government

Citizens exercised the right to vote for a national government for the first time in 1995; however, most opposition groups boycotted the election, claiming that the Government impeded their ability to participate in the political process, and those who participated complained of harassment. The boycott was one of the factors that led to an overwhelming victory by the better-funded and better-organized EPRDF over candidates of the relatively weak and poorly organized opposition parties and independent candidates. Nevertheless, observers organized by foreign donor governments, the Organization of African Unity (OAU), and a coalition of domestic NGO's judged the elections to be generally free and fair, although they cited numerous irregularities.

The Constitution requires that elections to the national legislative body, the HPR, be held every 5 years; the next elections are scheduled for May 2000. Seventeen opposition political parties are expected to contest the election, including the AAPO, the Southern Ethiopia People's Democratic Coalition, and the Oromo National Congress. In August all registered political parties were invited to a meeting sponsored by Africa Initiative for a Democratic World Order and the Addis Ababa University student association to discuss the ground rules for the elections. In November the Government initiated a dialog with opposition parties to discuss preparations for the election. Government officials stated that they would accept election monitoring by the OAU, local U.N. staff, and domestic NGO's, but that they would not invite international observers. In June a European diplomat received an official reprimand from the Ministry of Foreign Affairs for inviting a registered political party to meet with the international donor working group to discuss preparations

for the year 2000 elections. The Government stated that it would make efforts to level the playing field for non-EPRDF political parties, particularly in regard to access to mass media and the ability to open offices. The Government addressed one primary complaint of opposition parties by establishing an election time-table for nominating party candidates and for campaign activities that is much longer than the time-table used in the 1995 elections. In December the HPR struck down the election law that required civil servants to resign from their posts if they wished to run for elections.

The NEB is investigating abuses of election laws related to candidate registration for the 2000 election in the SNNPRS and in the Gambella region. There were credible reports the local officials throughout the country ignored NEB instructions on the acceptance of candidate endorsement signatures from opposition party candidates. In December the Government arrested up to 26 Nuer tribal political activists associated with the GPDC on charges of inciting Nuer students in November to demonstrate for the use of the Nuer language in schools (see Sections 1.d. and 5.). The GPDC claimed that charges were without merit and that the Government was attempting to interfere with the political process for the 2000 elections. The NEB sent investigators to the region, but had not issued a report by year's end. Political participation remains closed to a number of organizations that have not renounced violence and do not accept the Government as a legitimate authority. These groups include Medhin, the Coalition of Ethiopian Democratic Forces, the Ethiopian People's Revolutionary Party, the Oromo Liberation Front, some elements of the Ogaden National Liberation Front, and several smaller Somali groups. The AAPO complained that

the Oromiya regional government refused its application to open branch offices in the region (see Section 2.b.).

Neither law nor practice restricts the participation of women in politics; however, while women's status and political participation are greater than ever, women are underrepresented in national politics, the Council of Ministers, and among the leadership of all political organizations. Only 1 of the 15 members of the Council of Ministers is a woman; 2 other women hold ministerial rank; and a number of others hold senior positions. There only are 15 women among the 545 members of the HPR, and only 8 of 115 members in the upper house, the House of Federation, are women, including the speaker. Among the 23 judges on the federal High Court, 6 are women, and there are 2 women on the Supreme Court.

The government policy of ethnic federalism led to the creation of individual constituencies to help ensure representation in the HPR of all major ethnic groups; however, small ethnic groups were not represented in the legislature. There are 23 nationality groups in 6 of the region states that do not have a sufficient population to qualify for constituency seats, and as a result, the Government determined that individuals from these nationality groups would compete in 2000 for 23 special seats in addition to the 545-seat HPR.

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Supreme Court, U.S.
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No. 04-251

In the Supreme Court of the United States

NEGUSSU DEMISSIE AND KIRUBEL NEGUSSU,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

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QUESTION PRESENTED

Whether petitioners have identified any issue regarding the denial of their request for asylum and withholding of removal that warrants review by this Court.

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In the Supreme Court of the United States

No. 04-251

NEGUSSU DEMISSIE AND KIRUBEL NEGUSSU,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is *available in* 89 Fed. Appx. 394. The decisions of the immigration judge (Pet. App. 8-20) and the Board of Immigration Appeals (Pet. App. 4-7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2004. A petition for rehearing was denied on May 11, 2004 (Pet. App. 21). The petition for a writ of certiorari was filed on August 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States. 8 U.S.C. 1158(b) (2000 and Supp. I 2001). An alien seeking asylum bears the burden of establishing that he is a refugee and must demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987); 8 C.F.R. 208.13(a). An alien is ineligible for asylum if "there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii).

In addition, "if the Attorney General decides that the alien's life or freedom would be threatened" in the country of deportation "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," the Attorney General generally "may not remove" the alien to that country. 8 U.S.C. 1231(b)(3)(A).[1] To be entitled to withholding of

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, § 305, 110 Stat. 3009-602, substantially revised the provisions regarding withholding of removal, which are now codified at 8 U.S.C.

removal under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears the burden of proof of eligibility for withholding). Removal may not be withheld, however, in the case of a person believed to have committed a "serious nonpolitical crime" outside the United States prior to his arrival in the United States. 8 U.S.C. 1231(b)(3)(B)(iii).

2. Petitioner Demissie and his son, petitioner Negussu, are natives and citizens of Ethiopia, where they were members of the Amharic tribe. Pet. App. 8-9. Petitioners entered the United States on July 27, 1997, as nonimmigrant visitors, and they remained in the United States beyond the January 26, 1998, expiration date of their authorized visit. *Ibid.* In 1998, petitioners were placed in removal proceedings, and they applied for asylum, withholding of removal, and voluntary departure. *Id.* at 9; R. 88-92, 230. Petitioner Negussu's claim for relief is wholly derivative of his father's claim. Pet. App. 4 n.1.

3. a. In removal proceedings before the immigration judge, petitioner Demissie testified that he was a logistic and supply officer in the Ethiopian armed forces under the Mengistu regime. Pet. App. 9. Demissie further testified that in 1991, after Mengistu, who was ethnically Amharic, was replaced by the Ethiopian People Revolutionary Democratic Front (EPRDF), a party dominated by ethnic Tigreans, Demissie was detained and interrogated for three months after the new government ordered all army officers to report to designated bases.

1231(b)(3). IIRIRA governs the present case because its provisions apply to aliens who are placed in proceedings on or after April 1, 1997. IIRIRA Tit. III, Subtit. A, § 309(a) and (c), 110 Stat. 3009-625.

Id. at 9-10. He further testified that, after agreeing to train EPRDF officers, he was released and assured pension payments. *Id.* at 10. He testified that he was subsequently fired after he refused to join the Amharic wing of the EPDRF. *Ibid.*

Shortly thereafter, Demissie joined the Kefagne Ethiopian Patriotic Front (Kefagne), an outlawed group fighting the EPRDF. Pet. App. 10. Kefagne opposes EPRDF's policy of taking land from the farmers and giving it to Tigreans, and it "attacks government individuals using guerrilla tactics and other means (including shooting down a government helicopter, in one incident described by [Demissie]) to prevent the government from carrying out its policy." *Ibid.* Demissie testified that he joined the Kefagne because he disagreed with the ruling party's attempt to divide Ethiopia by ethnicity. R. 113, 116. He supported the armed struggle of the Kefagne movement, and believed that armed resistence was a legitimate response to the actions of the government. Pet. App. 25, 28; R. 137-138. Demissie claimed that "[w]e are engaged in guerrilla fighting as well to stop the land being taken away by the Tigrean." R. 151. Although Demissie testified that he never personally engaged in armed fighting or terrorist acts, he admitted recruiting individuals to join the Kefagne forces that were engaged in fighting against the government. R. 138, 148, 176.

These activities led to his second arrest by EPRDF. Demissie claimed that in January 1995 he was once more recruited by the EPRDF to train new recruits. Pet. App. 25. A month after declining EPRDF's request, he was arrested by EPRDF security forces and detained for seven months. Pet. App. 26; R. 124-125. He testified that during this time, he was repeatedly interrogated

and beaten in order to disclose his Kefagne affiliation and the names of Kefagne members. R. 124-125. He testified that, during this questioning, he falsely denied involvement with Kefagne because he feared being killed. R. 124. He was released on bail in September 1995, but was informed that the public prosecutor's office would continue the investigation into his activities. Pet. App. 26-27. The prosecutor's office questioned him twice in the following two months and informed him that he had committed a "serious political crime." *Id.* at 27; see R. 125-126.

Petitioner Demissie testified that, in September 1996, he was assigned by Kefagne to take ten new ex-army officers to Gondar, where they were to join the Kefagne forces. R. 149. In Gondar, government forces arrested the Kefagne recruits, but Demissie managed to escape. Pet. App. 27. He testified that he understood that the recruits were interrogated, beaten, and shot by the military. R. 128. Petitioner Demissie stayed at the house of a friend for the next ten months, during which time he learned from his wife that the army had questioned her regarding his whereabouts. R. 128-129. The Kefagne subsequently helped him leave Ethiopia because he was afraid of being killed. R. 129, 133. He testified that he has since learned that officials ransacked his home in Ethiopia and threatened his wife. R. 132-133. He believes that he would be imprisoned and killed if he returns to Ethiopia. R. 133-134.

b. The immigration judge denied petitioners' application for asylum and withholding of removal because Demissie "does not appear to have been persecuted or have a well-founded fear of persecution" within the meaning of the immigration laws. Pet. App. 17. The immigration judge found that the government of

Ethiopia was trying to defend itself from the "violence and guerrilla tactics" of the Kefagne, which opposes the government's land policy. *Id.* at 17-18. He reasoned that "[a] duly constituted and functioning government of a country has a legitimate right to protect itself against persons who seek its overthrow," and that "[s]uch a government has a legitimate right to investigate and detain individuals suspected of aiding or being a member of an organization that seeks to overthrow it." *Id.* at 17. The immigration judge further found that Demissie had been arrested and held for prosecution for violating laws applicable to the population as a whole, rather than persecuted for his political opinion. *Id.* at 18. He found "no indication that the government cared about [Demissie's] individual political opinion" nor was hostile to his Amharic ethnicity, noting that it had offered him a "position with the military and pressured him to join the Amharic wing of the EPRDF." *Id.* at 19. For the same reasons, the immigration judge denied petitioners' application for withholding of removal, reasoning that, because Demissie failed to demonstrate a well-founded fear of persecution, he could not meet the "higher standard of proof of clear probability of persecution" required to establish eligibility for withholding. *Id.* at 20.

4. The Board of Immigration Appeals (Board) affirmed for the reasons given by the immigration judge. Pet. App. 4-7. The Board rejected petitioners' argument that Demissie's fear of future arrest and detention for possible prosecution for his participation in the Kefagne constitutes a well-founded fear of persecution. The Board reasoned that the government of Ethiopia, as a sovereign nation, has a legitimate right to investigate and detain persons suspected of aiding or belonging to

an organization that seeks its overthrow. *Id.* at 5 (citing *In re R-*, 20 I. & N. Dec. 621 (BIA 1992)). The Board noted Demissie's 1995 arrest for his suspected recruitment of former army officers to the Kefagne, as well as his narrow escape from arrest in 1996 when he "was taking ten new [Kefagne] recruits * * * to join the Kefagne as either fighters or in another capacity." *Ibid.* Under these circumstances, the Board concluded, "the Ethiopian government's supposed interest in the prosecution of [Demissie] for his participation in the attempt to overthrow a lawfully constituted government does not constitute persecution within the meaning of the [Immigration and Nationality] Act." *Id.* at 6. The Board observed that punishment for participation in a coup may constitute persecution where a coup is the only available means of effecting political change, but the Board concluded that the fair and free election of the Government of the Federal Democratic Republic of Ethiopia in 1995 demonstrated that "there are other peaceful means to effect political change in Ethiopia, which the [Kefagne] has rejected." *Ibid.* Accordingly, the Board concluded that petitioners failed to meet the burden of proof with respect to their claim for asylum or the higher burden of proof required for eligibility for withholding of removal. *Id.* at 6-7.

5. The court of appeals unanimously denied petitioners' petition for review in an unpublished per curiam opinion. Pet. App. 1-3. The court noted that, "[r]ather than challenging the merits of the Board's decision on appeal, the Petitioners contend that the Board erroneously failed to address one of their issues, testimony, and much documentation of record, in violation of their due process rights." *Id.* at 2. The court rejected that argument, finding that the "Board need not . . . write

an exegesis on every contention. What is required is merely that it consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Id.* at 2 (internal quotation marks omitted). Applying this standard, the court found "the Board's opinion to be more than adequate to satisfy due process." *Ibid.*

ARGUMENT

Petitioners argue (Pet. 5-20) that the decision of the court of appeals conflicts with *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), which interpreted the "serious nonpolitical crime" exception to withholding of removal. But none of the decisions below turned on that exception, and the issues petitioners raise in this Court were neither presented to nor passed upon by the court of appeals. The unpublished decision of the court of appeals does not warrant this Court's review.

1. In *Aguirre-Aguirre*, this Court interpreted former 8 U.S.C. 1253(h)(2)(C), which provided that an alien who had committed a "serious nonpolitical crime" was ineligible for withholding of deportation. 526 U.S. at 418. Petitioners argue that the decision of the court of appeals is in conflict with that decision, and, more generally, that the decisions below misapplied the "serious nonpolitical crime" exceptions to asylum and to withholding of removal. See Pet. 5-20. Petitioners are mistaken. The rulings below did not turn on, or even address, the question whether petitioner Demissie committed a serious nonpolitical crime. Rather, petitioners were denied asylum and withholding of removal because petitioners failed to meet their burden of proof on the first step of the respective analyses of eligibility for

asylum and for withholding of removal: that petitioner Demissie was subjected to past persecution or faced a well-founded fear of future persecution, or that he faced a "clear probability of persecution." Pet. App. 5-7; *id.* at 16-20. Those conclusions do not conflict with *Aguirre-Aguirre*, which expressly did not address the question whether the alien would be subject to persecution. 526 U.S. at 418 ("The issue in the case is not whether the persecution is likely to occur."); *id.* at 422 ("[T]he BIA did not decide whether [Aguirre-Aguirre] had established the requisite risk of persecution because it determined that, in any event, he had committed a serious nonpolitical crime.").

Moreover, the issue the immigration judge and the Board did decide—that petitioners failed to prove a well-founded fear of persecution—would not warrant this Court's review even if petitioners challenged it here, because it involves only a largely factbound application of legal principles that are established in Board precedent and that petitioners do not challenge here. Weighing the evidence, the immigration judge found that petitioners failed to meet their burden of proof for two reasons. First, the immigration judge found that petitioner Demissie experienced arrest and detention for possible prosecution for violation of laws of general applicability based on the violent activities of the Kefagne, not persecution based on his political opinion or ethnicity. The immigration judge found that "the government of Ethiopia is trying to defend itself from Kefagne," which is protesting the government's land policy "with violence and guerrilla tactics," and that Demissie "was detained because he was helping a violent group that is fighting the government." Pet. App. 17-18. Second, the immigration judge found that Demissie

failed to establish the requisite causal connection between his treatment by the government and his political opinion or ethnicity. The judge found "no indication" that the government "cared about [Demissie's] individual political opinion" or that it was hostile to his Amharic ethnicity when the government "offered [Demissie] the position with the military and pressured him to join the Amharic wing of the EPRDF." *Id.* at 19.

The Board agreed with the reasoning of the immigration judge, and made additional observations pertaining to the authority of a sovereign nation to protect itself from persons who engage in armed struggle against it. Pet. App. 5-6. For example, the Board relied upon a report from the State Department, which concluded that the 1995 elections in Ethiopia were "free and fair although some irregularities were noted." *Id.* at 6; see *id.* at 5 ("The record reflects the [Kefagne] consists of disgruntled former soldiers in the Gondar region of Ethiopia who have refused to relinquish armed struggle in support of their aims and carry on sporadic ambushes on Ethiopian government forces.").

These factbound determinations are supported by substantial evidence and raise no issues warranting the Court's review.

2. The petition should be denied for the further reason that the arguments petitioners now make were neither pressed in nor passed upon by the court of appeals. On petition for review in that court, petitioners sought review only of the question "[w]hether the Board violated due process when (1) it failed to adjudicate one of Mr. Demissie's issues on appeal, and (2) it failed to consider meaningfully both Mr. Demissie's probative testimony and also much of the documentation of record which supported Mr. Demissie's claims to relief." Pet.

C.A. Br. 2. In its decision, the court of appeals rejected only those arguments, and petitioners do not contend that the court's rejection of those arguments conflicts with the decision of any court. By contrast, the court of appeals did not pass on the merits-based assertions petitioners raise in this Court,[2] which in any event are tied to his arguments relying on *Aguirre-Aguirre* and the serious nonpolitical crime exception that were not the basis for any of the decisions below. See Pet. 13, 17-19. The court of appeals' failure to address those issues is not surprising, given that petitioners' reply brief in the court of appeals expressly disclaimed any request that the court determine "whether the Board's decision might ultimately be correct." Pet. C.A. Reply Br. 12; *id* at 11 ("He asks only that the Court remand his case to the Board with instructions that (1) the Board adjudicate all arguments he raised before it, and (2) the Board meaningfully consider all probative evidence which he placed on the record in support of his applications for asylum and withholding of removal. He no longer asks that the Court find that he suffered past persecution."). Petitioner has provided no reason why this Court should depart from its usual practice of not considering arguments that were neither pressed in nor passed upon by the court of appeals. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

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[2] For example, the court of appeals did not, as petitioners suggest (Pet. i), "mischaracteriz[e] ethnically motivated land appropriation as the legitimate exercise of authority by majority ethnic Tigreans," or find that the "Kefange * * * was attempting to overthrow the government."

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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